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(9)

No. 06-10119 3-14-07

IN THE

SUPREME COURT OF THE UNITED STATES

ALLEN SNYDER
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE LOUISIANA SUPREME COURT

PETITION FOR WRIT OF *CERTIORARI*

THIS IS A CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

Petitioner Allen Snyder, a black man, was convicted and sentenced to death by an all-white jury in Jefferson Parish, Louisiana, for the fatal stabbing of his wife's male companion. Prior to trial, the prosecutor reported to the media that this was his "O.J. Simpson case." At trial, the prosecutor peremptorily struck all five African Americans who had survived cause challenges and then, over objection, urged the resulting all-white jury to impose death because this case was like the O.J. Simpson case, where the defendant "got away with it." On initial review, a majority of the Louisiana Supreme Court ignored probative evidence of discriminatory intent, including the prosecutor's O.J. Simpson remarks and argument, and denied Mr. Snyder's *Batson* claims by a 5-2 vote.

This Court directed the court below to reconsider Mr. Snyder's *Batson* claims in light of *Miller-El v. Dretke*, 545 U.S. 231 (2005). *See Snyder v. Louisiana*, 545 U.S. 1137 (2005). On remand, a bare majority adhered to its prior holding, once again disregarding substantial evidence establishing discriminatory intent, including the prosecutor's references to the O.J. Simpson case, the totality of strikes against African-American jurors, and evidence showing a pattern of practice of race-based peremptory challenges by the prosecutor's office. In addition, the majority imposed a new and higher burden on Mr. Snyder, asserting that *Rice v. Collins*, 546 U.S. 333 (2006), permitted reversal only if "a reasonable factfinder [would] necessarily conclude the prosecutor lied" about the reasons for his strikes. Three justices, including the author of the original opinion, dissented, finding the prosecutor's reference to the O.J. Simpson case in argument to an all-white jury, made "against a backdrop of the issues of race and prejudice," supported the conclusion that the State improperly exercised peremptory strikes in a racially discriminatory fashion.

The Louisiana Supreme Court's consideration of Mr. Snyder's *Batson* claims on remand from this Court raises the following important questions:

1. Did the majority below ignore the plain import of *Miller-El* by failing to consider highly probative evidence of discriminatory intent, including the prosecutor's repeated comparisons of this case to the O.J. Simpson case, the prosecutor's use of peremptory challenges to purge all African Americans from the jury, the prosecutor's disparate questioning of white and black prospective jurors, and documented evidence of a pattern of practice by the prosecutor's office to dilute minority presence in petit juries?

2. Did the majority err when, in order to shore up its holding that Mr. Snyder had failed to prove discriminatory intent, it imported into a direct appeal case the standard of review this Court applied in *Rice v. Collins*, an AEDPA habeas case?

3. Did the majority err in refusing to consider the prosecutor's first two suspicious strikes on the ground that defense counsel's failure to object could not constitute ineffective assistance of counsel because *Batson* error does not render the trial unfair or the verdict suspect – *i.e.*, that failure to raise a *Batson* objection can never result in prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984) – a holding directly conflicting with decisions from *inter alia* the Third Circuit Court of Appeals and the Alabama and Mississippi Supreme Courts?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

INDEX OF APPENDICES ix

INTRODUCTION 1

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. Proceedings Below 2

B. Statement of Relevant Facts 3

1. Pre-Trial Publicity and the O.J. Simpson Case 3

2. Voir Dire 5

a. Gregory Scott 5
b. Thomas Hawkins 6
c. Elaine Scott 6
d. Jeffrey Brooks 7
e. Loretta Walker 8

3. The Trial 8

4. Mr. Snyder's Motion for New Trial 10

C. The Louisiana Supreme Court's Initial Opinion Addressing the *Batson* Claims 10

D. This Court's Order Remanding the Case 12

E. Proceedings Following Remand 12

F. The Majority Opinion of the Louisiana Supreme Court 14

G. The Dissenting Views of Three Justices 20

REASONS FOR GRANTING THE WRIT 23

I. The majority's decision to reinstate on remand from this Court its prior rejection of Mr. Snyder's claim that the prosecution had purposefully excluded African Americans from his capital jury in violation of *Batson* so conflicts with the decision and analysis of *Miller-El v. Dretke* that this Court's intervention under Supreme Court Rule 10(c) is required 23

A. The Louisiana Supreme Court's majority opinion paid lip service to this Court's Order requiring it to reconsider the merits of Mr. Snyder's *Batson* claim in light of *Miller-El v. Dretke* by once again ignoring highly probative evidence that the prosecutor intentionally struck qualified African-American prospective jurors on the basis of their race 24

B. The Louisiana Supreme Court erred in importing the standard of review applied in the AEDPA habeas proceeding of *Rice v. Collins*, to review Mr. Snyder's *Batson* claim on direct appeal 30

II. The Louisiana Supreme Court erred in holding that trial counsel can never be found ineffective for failing to raise a meritorious *Batson* challenge because *Batson* error does not affect the reliability of the verdict and thus cannot prejudice the defense 33

CONCLUSION 37

TABLE OF AUTHORITIES

United States Supreme Court Cases

Batson v. Kentucky, 476 U.S. 79 (1986) ..... *passim*

Brecht v. Abrahamson, 507 U.S. 619 (1993) 30-31

Hernandez v. New York, 500 U.S. 352 (1995) 32

Kyles v. Whitley, 514 U.S. 419 (1995) 15

Maine v. Taylor, 477 U.S. 131 (1986) 32

Miller-El v. Cockrell, 537 U.S. 322 (2003) 23

Miller-El v. Dretke, 545 U.S. 231 (2005) ..... *passim*

Powers v. Ohio, 499 U.S. 400 (1991) 34, 35

Rice v. Collins, 546 U.S. 333 (2006) 1, 14-15, 20, 30, 31-32

Rose v. *Mitchell*, 443 U.S. 545 (1979) 35

Sawyer v. Whitley, 505 U.S. 333 (1992) 32

Strauder v. West Virginia, 100 U.S. 303 (1880) 34

Strickland v. Washington, 466 U.S. 668 (1984) 12, 17, 33-36

Swain v. Alabama, 380 U.S. 202 (1965) 14

Vasquez v. Hillery, 474 U.S. 254 (1986) 35

Lower Federal Court Cases

Becht v. United States, 403 F.3d 541 (8th Cir. 2005) 35

Bell v. Lockhart, 795 F.2d 655 (8th Cir. 1986) 36

Bowen v. Foltz, 763 F.2d 191 (6th Cir. 1985) 36

Boyd v. Newland, 467 F.3d 1139 (9th Cir. 2006) 24

Davidson v. Gengler, 852 F. Supp. 782 (W.D.Wis. 1994) 34

Davis v. Sec'y for the Dept. of Corr., 341 F.3d 1310 (11th Cir. 2003) 34

Eagle v. Linahan, 279 F.3d 926 (11th Cir. 2001) 35-36

Gov't of the Virgin Islands v. Forte, 865 F.2d 59 (3rd Cir. 1989) 33

Gray v. Greer, 800 F.2d 644 (7th Cir. 1985) 36

Hightower v. Terry, 459 F.3d 1067 (11th Cir. 2006), *cert. granted, Hightower v. Schofield*, 545 U.S. 1124 (2005) 23

Kesser v. Cambra, 465 F.3d 351 (9th Cir. 2006) 26, 28

Miller-El v. Dretke, 361 F.3d 849 (5th Cir. 2004) 23, 29

Reed v. Norris, 195 F.3d 1004 (8th Cir. 1999) 34

Rosa v. Peters, 36 F.3d 625 (7th Cir. 1994) 35

Schwander v. Blackburn, 750 F.2d 494 (5th Cir. 1985) 36

Tankleff v. Senkowski, 135 F. 3d 235 (2nd Cir. 1988) 35

United States v. McFerron, 163 F.3d 952 (6th Cir. 1998) 35

State Cases

Batiste v. State, 888 S.W.2d 9 (Tex. Ct. Crim. App. 1994) 34

Ex parte Yelder, 575 So.2d 137 (Ala. 1991) 34

Hernandez v. Bunge Corp. 814 So. 2d 783 (La. App. 2002) 32

State v. Bridgewater, 823 So.2d 877 (La. 2002) 14

State v. Dunn, 831 So. 2d 862 (La. 2002) 32

State v. Durham, 673 So.2d 1103 (La. Ct. App. 1996) 14

State v. Harris, 820 So.2d 471 (La. 2002) 13, 14, 35

State v. Jacobs, 789 So. 2d 1280 (La. 2001) 13-14, 15

State v. Kyles, 513 So. 2d 265 (La. 1987) 15

State v. Lucky, 755 So.2d 845 (La. 1999) 14

State v. Myers, 761 So. 2d 498 (La. 2000) 14

State v. Neal, 796 So.2d 649 (La. 2001) 14

State v. Scott, 921 So. 2d 9044 (La. 2006) 32

State v. Seals, 684 So.2d 368 (La. 1996) 14

State v. Taylor, 781 So.2d 1205 (La. 2001) 14

State v. Taylor, 679 N.W.2d 893 (Wis. App. 2004) 34

State v. Thompson, 516 So. 2d 349 (La. 1987) 15

State v. Thompson, 825 So. 2d 552 ((La. App. 2002) 15

State v. Tyler, 723 So. 2d 939 (La. 1998) 32

Triplett v. State, 666 So.2d 1356 (Miss. 1995) 34

United States Constitutional Provisions

CONST. amend VI 2, 36

CONST. amend. XIV 2, 36

Federal Statutes

28 U.S.C. §1257 2

28 U.S.C. 2254 31

Fed.R.Civ.P. 52 32

Additional Authority

Amanda S. Hitchcock, *"Deference Does Not by Definition Preclude Relief": The Impact of Miller-El v. Dretke on Batson Review in North Carolina Capital Appeals*, 84 N.C.L. Rev. 13280 (2006) 24

Note, *Constitutional Law - Equal Protection - Seventh Circuit Denies a Criminal Defendant's Objection to His Counsel's Race-based Peremptory Challenge - United States v. Boyd, 86 F.3d 719 (7th Cir. 1996)*, 110 Harv. L. Rev. 1334 (1997) 35

INDEX OF APPENDICES

APPENDIX A: Louisiana Supreme Court's opinion in *State v. Snyder*, 942 So. 2d 484 (La. 2006)

APPENDIX B: Unpublished order denying rehearing, dated December 15, 2006

APPENDIX C: Louisiana Supreme Court's opinion in *State v. Snyder*, 750 So. 2d 832 (La. 1999)

PETITION FOR A WRIT OF *CERTIORARI*

Petitioner, Allen Snyder, respectfully petitions this Court to review the decision of the Louisiana Supreme Court.

INTRODUCTION

Following this Court's order remanding Mr. Snyder's case for reconsideration in light of *Miller-El v. Dretke*, 545 U.S. 231 (2005), a bare majority of the Louisiana Supreme Court once again rejected Mr. Snyder's *Batson* claim. *State v. Snyder*, 942 So. 2d 484 (La. 2006). The majority construed this Court's remand not as a rejection of the analysis performed in its initial decision, but "as a mere expansion of our review . . . ." *Id.* at 495. Rather than expanding its review, however, the majority actually constricted it, relying extensively on its earlier analysis of the *Batson* issue, once again ignoring probative evidence of the prosecutor's discriminatory intent, and imposing a higher burden of proof in this direct appeal case, which the majority imported from the analysis applied in *Rice v. Collins*, 546 U.S. 333 (2006), a habeas proceeding governed by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). The majority's decision to affirm the conviction and death sentence so conflicts with the decision and analysis of *Miller-El* that this Court's intervention under Supreme Court Rule 10(c) is required.

OPINIONS BELOW

The opinion of the Louisiana Supreme Court in *State v. Snyder*, 942 So. 2d 484 (La. 2006) (*Snyder III*) (attached as Appendix A hereto), consists of a majority opinion affirming the conviction and death sentence authored by Justice Weimer, a dissenting opinion authored by Justice Kimball and joined by Chief Justice Calogero, and a dissenting opinion authored by Justice Johnson. The unpublished order of the Louisiana Supreme Court denying rehearing on December 15, 2006, is

attached as Appendix B hereto.

JURISDICTIONAL STATEMENT

Following this Court's remand in *Snyder v. Louisiana*, 545 U.S. 1137 (2005), a majority of the Louisiana Supreme Court, on September 6, 2006, once again affirmed Mr. Snyder's conviction and death sentence. Mr. Snyder's timely Application for Rehearing was denied on December 15, 2006. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following constitutional provisions.

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . and to have the Assistance of Counsel for his defence.*

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> *[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

STATEMENT OF THE CASE

A. Proceedings Below

Mr. Snyder was indicted by a Jefferson Parish, Louisiana grand jury on September 14, 1995, for the first degree murder of Howard Wilson. Jury selection began on August 27, 1996, and the guilt-innocence phase of the trial commenced on August 28, 1996. On August 29, 1996, the jury returned a verdict finding Mr. Snyder guilty of first degree murder. The sentencing phase of the trial began and ended the following day, resulting in the jury's unanimous decision to sentence Mr. Snyder to death. Mr. Snyder was formally sentenced to death on August 22, 1997.

The conviction and death sentence were automatically appealed to the Louisiana Supreme Court. On April 14, 1999, the lower court, by a 5-2 vote, conditionally affirmed the conviction and death sentence, but ordered the case remanded to the trial court to address competency issues. *State v. Snyder*, 750 So. 2d 832 (La. 1999) ("*Snyder I*") (Appendix C hereto). Following remand, the Louisiana Supreme Court, on April 14, 2004, upheld the trial court's determination that Mr. Snyder was legally competent to stand trial, and unconditionally affirmed the conviction and death sentence. *State v. Snyder*, 874 So. 739 (La. 2004) ("*Snyder II*").

Mr. Snyder filed a petition for writ of *certiorari* which this Court granted, vacating the Louisiana Supreme Court's judgment, and remanding the case for further consideration in light of *Miller-El v. Dretke*, 545 U.S. 231 (2005). *Snyder v. Louisiana*, 545 U.S. 1137 (2005).

Following remand, a slender majority of the Louisiana Supreme Court again affirmed the conviction and death sentence. *Snyder III, supra*, 942 So. 2d 484. Three justices dissented. *See id.* at 500-05 (Kimball, J., joined by Calogero, C.J., dissenting); *id.* at 505-09 (Johnson, J., dissenting). The court denied Mr. Snyder's timely application for rehearing, with the three dissenting justices voting to grant rehearing.

B. Statement of Relevant Facts

1. Pre-Trial Publicity and the O.J. Simpson Case

Mr. Snyder was charged with first degree murder in connection with the August 15, 1995, stabbing death of Howard Wilson and the non-fatal stabbing of Mr. Snyder's wife.[1] After Mr.

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[1] The evidence presented at trial showed that, at the time of the offense, Mr. Snyder and his wife of nine years, Mary Snyder, were separated and living apart, but were discussing the possibility of reconciliation, R. 1263. On the day of the offense, Mr. Snyder's wife had rebuffed Mr. Snyder's attempts to speak with her and, that evening, had gone on a date with a married man she had just met, Howard Wilson. R. 1265. At approximately 1:30 a.m., Mr. Wilson drove Mrs. Snyder to the home in which she was staying,

Snyder had been indicted and before the start of trial, the Jefferson Parish prosecutor made numerous statements to the press and public comparing Mr. Snyder's case to the O.J. Simpson case. The defense filed a *Motion in Limine to Preclude the State from Making Reference or Comparison to Other Notorious Prosecutions* seeking to prevent any further such comments by the prosecutor. R. 159-61. As the defense explained:

> References of the kind referred to above serve no purpose other than as an attempt to confuse and prejudice the jury. Surveys conducted since the verdicts in the O.J. Simpson trial have shown consistently that a large majority of white Americans believe the not guilty verdicts were wrong; many indicate that the verdicts have undermined their faith in the entire jury system. To play upon these fears and prejudices to what will doubtless be an overwhelmingly - if not all - white jury deciding a case with admitted similarities is an appeal to racism at worst and vigilante justice at best, and as such is specifically precluded by Louisiana law.

R. 160. The trial court denied the motion after the prosecutor represented that he would not mention the O.J. Simpson case "during the course of the taking of evidence or before the jury in this case." R. 418-19.[2]

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id., where Mr. Snyder was waiting across the street to speak with her. When Mrs. Snyder did not get out of the car for some time, Mr. Snyder approached and opened the car door; a struggle ensued during which Mr. Snyder stabbed both Howard Wilson and Mrs. Snyder with a knife. R. 1242-43. The injuries to Mrs. Snyder were non-fatal, but Mr. Wilson died as a result of his wounds. Later, Mr. Snyder returned to his home, barricaded himself inside and called the police, apparently suicidal. R. 1284. Police responding to the call found him curled up in a fetal position in his home mumbling "they're coming to get me." R. 1162-68.

[2] Following the trial court's denial of Mr. Snyder's motion in limine, the prosecutor apparently continued to make remarks to the media concerning his "O.J. case," forcing the defense to file a *Motion for an Order Prohibiting the Attorneys from Commenting on the Trial to the Media* (R. 179-80). At argument on the motion on August 27, 1996, defense counsel noted that, the day before, she had been asked by a television news reporter to comment "on the second O.J. Simpson case that was scheduled to go to trial in Jefferson Parish today." R. 478. The prosecutor did not disavow these comments, but argued that the sequestered jury would not be exposed to publicity, R. 477, and contended that he had no intention of discussing the case with the media while the trial was in progress, R. 479. The trial court denied the motion. R. 479.

2. Voir Dire

Jury selection began on August 27, 1996, and lasted a total of one and a half days. In panels primarily of fourteen, jurors were first questioned by the prosecutor, then by the defense (with occasional follow-up questioning by the prosecution); cause and peremptory challenges to the jurors in each panel followed the same sequence. Those jurors who were accepted by both parties were sworn in before the next panel was questioned.[3] In this fashion, a jury of twelve was selected from the first six panels of prospective jurors. Two alternates were seated following questioning of the seventh panel.

There were a total of nine African Americans in the pool of eighty-five eligible venire persons from which the twelve-member jury was selected. Four were removed by the State for cause, and the remaining five were peremptorily challenged by the State.[4] The State's peremptory challenges against African-American venire persons were as follows:

a. Gregory Scott

Mr. Scott sat on the second panel. Neither the State nor the defense saw any basis to challenge Mr. Scott for cause following his questioning; however, the State used its second peremptory challenge to remove Mr. Scott from the venire.[5] The defense noted that Mr. Scott was

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[3] At the conclusion of questioning the fourth panel of prospective jurors, the State began back-striking some of the jurors who had initially been accepted by both parties, starting with the back strike of African American Jeffrey Brooks.

[4] The only African-American venire person not stricken by the State, Jacqueline Woods, was in the seventh panel, which was questioned to seat two alternate jurors after the twelve-member jury had already been selected. R. 1126. None of the alternates sat.

[5] Mr. Scott's unremarkable voir dire testimony established that he could consider both the death penalty and a life sentence, R. 786, 828, that his wife's car had been stolen at gunpoint, R. 804, that he could consider insanity and manslaughter if the defense presented evidence consistent with the legal definition, R. 804, 823-24, and that he felt he would want to testify if he were innocent of a crime, R. 818-19. Mr. Scott's

African American, but did not lodge a *Batson* objection. R. 831.

b. Thomas Hawkins

Mr. Hawkins sat on the third panel and was not challenged for cause by either side. Mr. Hawkins, however, was removed by the State's fourth peremptory challenge.[6] The defense noted that Mr. Hawkins was African American, but did not lodge a *Batson* objection. R. 901.

c. Elaine Scott

Ms. Scott sat on the third panel and the State used its sixth peremptory challenge to strike her from the venire. Noting that Ms. Scott was now the third African American subject to a peremptory strike by the State, the defense lodged a formal *Batson* objection. The State responded that its reasons for striking Ms. Scott were that (1) she was "very weak on her ability to consider the imposition of the death penalty" because she used the word "think" in answering the prosecutor's

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feelings about a defendant's right not to testify favored the State. Moreover, the State chose to strike Mr. Scott while accepting several white prospective jurors whose voir dire responses demonstrated attitudes favorable to the defense, *e.g.* seated jurors William Bennett (an emergency room nurse who testified that his experiences with people suffering from mental illness showed that "some of the things people did were because they didn't know that it was wrong," R. 698); Donald Wolfe (who testified that he had previously served on a Jefferson Parish jury that acquitted a defendant of first degree murder, R. 933, and that the burden of proof in a criminal trial is "much much greater" than in a civil proceeding, R. 944); and John Penny (testifying that he had served on a Jefferson Parish jury that acquitted a defendant of second degree murder and returned a manslaughter conviction, R. 977-78, 990).

[6] Mr. Hawkins' voir dire responses did not reveal any obvious reasons for the State's use of a peremptory challenge to remove him. A ship foreman at Shell Oil refinery, who was married and had three children, R. 844, Mr. Hawkins told the prosecutor that he could consider both the imposition of the death penalty and a life sentence. R. 848, 856. Although Mr. Hawkins expressed confusion during the State's questioning regarding the difference between holding the defense to its burden of proving legal insanity and simply considering an insanity defense, upon subsequent questioning by the defense, he clarified that he would hold the defense to its burden of proof and properly consider the insanity defense. R. 863, 874-875. Otherwise, his testimony was unremarkable. He stated he would not hold a defendant's decision not to testify against him, R. 886, that he had several friends who were Jefferson Parish police officers, R. 877, that he had spent two years in the army, R. 880; and that he would take his responsibilities as a juror very seriously, R. 890.

questions and (2) she was "very positive" about a life sentence. R. 902.[7] The trial court, without appearing to consider whether the State's proffered reasons found support in Ms. Scott's voir dire testimony, overruled the *Batson* objection, stating simply: "All right. I'm going to go ahead and allow the challenge." R. 903-04.

d. Jeffrey Brooks

Mr. Brooks sat on the first panel and was originally accepted by both parties. On the second day of voir dire, the State used its seventh peremptory challenge to backstrike Mr. Brooks, the only African American provisionally accepted at that point. R. 953. The defense lodged a *Batson* objection. In response, the prosecutor stated that he had three reasons he had thought of the previous night, but proceeded to provide only two: (1) that Mr. Brooks "looked very nervous to me throughout his questioning" and (2) that he was a student teacher and therefore "might come back with guilty of a lesser verdict so there wouldn't be a penalty phase."[8] R. 954. Defense counsel countered that the concerns Mr. Brooks had earlier expressed about his student-teaching schedule

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[7] The record does not support the State's proffered reasons for striking Ms. Scott. During death qualification, the first of three questions the prosecutor asked her was whether she could consider imposing the death penalty if Mr. Snyder were found guilty of first degree murder. R. 851. In response, Ms. Scott replied affirmatively, "I think I could." R. 852. Even assuming this response suggested ambivalence about the death penalty, the prosecutor failed to ask any follow-up questions, although the State routinely asked additional questions of white jurors who appeared hesitant about the death penalty, *see, e.g.*, R. 758-61; 786-87; 965–66, or who testified that they could not impose it, *see, e.g.*, R. 636, 752, 753, 754, 787, 849, 852, 921, 966. Moreover, absolutely nowhere does the voir dire transcript reflect what the prosecutor claimed his "notes reflect," *i.e.*, that "she was very positive on when I said about a life sentence, she was very positive on her reason – Her agreement that she could do [a life sentence]." R. 902. In fact, when looking at the prosecutor's questions about jurors' ability to consider a life sentence, it appears not only that Ms. Scott was not "very positive" about a life sentence, but that the question she was answering was whether she could consider the death penalty – to which she responded "I could." R. 859-60. Scott's only other death penalty response – to defense counsel's question about whether she would consider mitigating circumstances – was one word: "Right." R. 895.

[8] The prosecutor explained that a juror might "get smart" and decide to return a second degree murder conviction in order to avoid a penalty phase. R. 955.

had been allayed when the dean of his program assured the trial court that the trial would not interfere with his school work, and that Mr. Brooks looked no more nervous than anyone else in the venire.[9] R. 955-56. Without articulating any basis for its decision, the trial court overruled the *Batson* objection, stating: "All right. I'm going to allow the challenge. I'm going to allow the challenge." R. 956.

e. Loretta Walker

Ms. Walker sat on the fourth panel. The State used its eighth peremptory strike against Ms. Walker, its third straight against an African American. The defense again objected to the State's challenge based on *Batson*. The State argued that its reason for striking Ms. Walker was that she could only impose the death penalty under limited circumstances. R. 958. The trial court overruled the defense's objection and allowed the removal of Ms. Walker, stating: "All right. The Court is going to allow the challenge." R. 959.

As a result of the State's challenges, all twelve empaneled jurors who convicted Mr. Snyder and sentenced him to death were white.

3. The Trial

The guilt phase of the trial began on August 28, 1996, and finished the following day with the jury's verdict finding Mr. Snyder guilty of first degree murder. Substantial evidence established

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[9] The prosecutor did not question Brooks at all regarding the impact of his schedule on his service after the dean of the education program assured the court that the trial would not interfere with Brooks's ability to complete his studies and Brooks accepted this position. R. 551-52. Moreover, the prosecutor expressed no concerns about the scheduling conflicts to which white prospective jurors Arthur Yaeger (seated as Juror No. 9), Michael Sandras and Kelly McMurray testified. *See* R. 507-08, 982, 983, *see also Snyder III*, 942 So. 2d at 501-04 (Kimball, J., dissenting). Further, the trial court did not express any opinion about whether Brooks appeared "nervous," in the face of defense counsel's argument that he appeared no more nervous than anyone else, R. 956, and, as Justice Kimball observed in her dissenting opinion, the record, to the contrary, "seems to indicate that Mr. Brooks was an engaged and voluble juror throughout voir dire examination." *Id.* at 502 (Kimball, J., dissenting).

both that Mr. Snyder acted in the heat of passion upon finding his wife, in the early hours of the morning, in a car with another man and that his wife's previous infidelity had led to a noticeable deterioration in his mental and physical state during the weeks prior to the crime. Despite this, Mr. Snyder's all-white jury failed to give meaningful consideration to his manslaughter defense, returning with a verdict of guilty of first degree murder within forty-eight minutes of retiring for deliberations. R. 1363, 1366.

The sentencing phase of the trial began and ended on August 30, 1996. During rebuttal closing argument, the prosecutor urged the jury to sentence Mr. Snyder to death because O.J. Simpson "got away with it":

> [Defense counsel] tried to describe this man as being the man who – And it was 12 hours later when he called the Kenner Police Department, huddled up, claiming that he was suicidal, barricaded himself in the house. That made me think of something. Made me think of another case, the most famous murder case in the last, in probably recorded history, that all of you all are aware of –
>
> [Trial court overrules defenses objection.]
>
> The most famous murder case, and all of you all have heard about it, happened in California *very, very, very similar to this case.* The perpetrator in that case claimed that he was going to kill himself as he drove in a Ford Bronco and kept the police off of him, and you know what, *he got away with it. Ladies and Gentlemen, is it outside the realm of possibility that that was what that man was thinking about when he called in and claimed that he was going to kill himself?*

R. 1591-93 (emphasis supplied).[10] After two and a half hours of deliberations, the jury returned with a sentence of death. R. 1598.

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[10] The prosecutor's O.J. Simpson argument was not even plausible. At the time of the crime, Mr. Snyder could not possibly have been thinking of O.J. Simpson's acquittal, as the O.J. Simpson verdict was returned nearly two months later, on October 3, 1995. *See, e.g.*, Martin Gottlieb, *Not Guilty: the Racial Prism; Racial Split at the End, as at the Start,* THE NEW YORK TIMES, 10/4/05; John Pope, *Some in N.O. Elated, Some Stunned,* THE TIMES PICAYUNE, 10/4/05, at A4.

4. Mr. Snyder's Motion for New Trial

Mr. Snyder filed a motion for new trial, arguing, *inter alia*, that the trial court's erroneous *Batson* rulings required vacation of the conviction and death sentence.[11] R. 199-201. During argument on the motion, conducted August 22, 1997, defense counsel observed that the prosecutor's O.J. Simpson argument could not have been made, but for the fact that the State had secured an all-white jury in this matter. Defense counsel contended that "[t]he prosecutor had maneuvered the jury around to where it was all white," because "it's kind of hard to say things about a black defendant when there's one or two blacks on the jury," R. 1618, and stressed the racially divisive nature of the prosecutor's O.J. Simpson argument:

> [Y]ou'd have to be in a cave for the last couple of years to not know, and the prosecutor knew exactly what he was doing, to not know that most white people, this was an all white jury, believed that O.J. Simpson was guilty as hell, and that he was getting away with murder, you know. And it's outrageous for the prosecutor to analogize to that case, to this case, which has nothing to do with it . . . [a]nd to hammer this man down, and to get a jury to say, That's right, you know, O.J. Simpson got off, this guy is trying to get off, he's like O.J. Simpson, you know, but we weren't on that jury in California, but we're on a jury here, we can do something about it. And that's totally outrageous.

R. 1617-18. The trial court denied the motion for new trial, R. 1625, and, a few minutes later, formally sentenced Mr. Snyder to death, R. 1627.

C. The Louisiana Supreme Court's Initial Opinion Addressing the *Batson* Claims

Mr. Snyder's first degree murder conviction and death sentence were automatically appealed to the Louisiana Supreme Court. In a fractured decision, a majority of the court conditionally

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[11] During pretrial proceedings and at trial, Mr. Snyder was represented by the public defender's office. Following the jury's verdicts, Mr. Snyder's family retained new counsel, who represented Mr. Snyder from the Motion for New Trial through the denial of rehearing in *Snyder II*. Undersigned counsel's office, the Capital Appeals Project, undertook representation of Mr. Snyder following the denial of rehearing.

affirmed Mr. Snyder's conviction and death sentence, but remanded for a hearing to address whether Mr. Snyder had been competent at the time of trial. *See Snyder I*, *supra*, 750 So. 2d 832.

With respect to Mr. Snyder's claim that the prosecutor exercised peremptory challenges on the impermissible basis of race, a majority of the Louisiana Supreme Court acknowledged that "[t]he prosecutor used peremptory challenges to strike every African American called as a prospective juror who survived challenges for cause. This resulted in an all-white jury for the defendant, who is African American." *Id.* at 839. Despite this finding, the majority deferred to the trial court's unblinking acceptance of the prosecutor's proffered race-neutral reasons and upheld the trial court's denial of Mr. Snyder's *Batson* challenges. *Id.* at 842.

In so doing, the majority gave short shrift to compelling evidence that the prosecutor had intentionally discriminated on the basis of race in exercising his peremptory challenges. Not only did it pay little heed to the fact that the prosecutor struck every single African American who had survived cause challenges, the majority did not consider direct evidence that, before trial, the prosecutor had evinced the intent to inject the issue of race into the proceedings by proclaiming that this case was like the racially polarizing O.J. Simpson case, and that, during trial, this intent was realized when the prosecutor, in penalty phase closing argument, actually played the O.J. Simpson card. As Justices Lemmon and Johnson concluded, in separate dissenting opinions, "the prosecutor's intention to utilize racial bias became crystal clear when he commented during closing argument in the penalty phase that O.J. Simpson 'got away with it.'" *Id.* at 864 (Lemmon, J., concurring and dissenting in part); *see also id.* at 866 (Johnson J., dissenting) ("The prosecutor utilized the O. J. Simpson verdict to racially inflame the jury's passion to sentence this defendant to death. Such tactics leave no doubt in my mind that the prosecutor had a racially discriminatory purpose for

excluding the African-American jurors.").[12]

The Louisiana Supreme Court also refused to consider the prosecutor's use of peremptory challenges to remove the first two African Americans in the venire on grounds that defense counsel had failed to raise *Batson* objections to these strikes. On appeal, Mr. Snyder urged that his trial counsel were ineffective in failing to object under *Batson*. The Louisiana Supreme Court, however, held that because a *Batson* violation does not "render the trial unfair or verdict suspect," it cannot result in prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), and, accordingly, such error cannot establish that counsel was ineffective.

D. <u>This Court's Order Remanding the Case</u>

At the time Mr. Snyder first sought review in this Court, following the Louisiana Supreme Court's decision unconditionally affirming the conviction and death sentence in *Snyder II*, the case of *Miller-El v. Dretke*, was pending before this Court. *See Miller-El v. Dretke*, 542 U.S. 936 (2004) (granting petition for writ of *certiorari*). Two weeks after this Court granted relief in *Miller-El*, *supra*, 545 U.S. 231, it granted Mr. Snyder's petition, vacated the Louisiana Supreme Court's judgment, and remanded the case for further consideration in light of *Miller-El*. *Snyder v. Louisiana*, 545 U.S. 1137 (2005).

E. <u>Proceedings Following Remand</u>

The Louisiana Supreme Court ordered additional briefing. In his *Brief upon Remand from the Supreme Court of the United States* ("*Brief upon Remand*"), Mr. Snyder presented the following

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[12] The court did address the prosecutor's prejudicial O.J. Simpson case comparisons in a separate section of its opinion, but ruled that the prosecutor's argument, even if improper, did not require reversal of the death sentence because the court was not "firmly convinced" that the comments influenced the jury or contributed to the verdict. *Id.* at 846.

evidence to prove that the prosecutor's proffered race-neutral reasons for striking African-American jurors were pretextual and that the prosecutor had instead struck these jurors because of their race:

- **Statistics:** Mr. Snyder pointed out in his brief that the prosecutor had seated an all-white jury by using close to half of his peremptory strikes to exclude the five eligible African-American prospective jurors, a group comprising only 14% of the qualified pool (five out of thirty-six). The State used its strikes to challenge 100% of the qualified African-American prospective jurors, while using peremptory challenges on only 23% of the qualified white prospective jurors (7 out of 31). The State thus struck African Americans at more than four times the rate of white prospective jurors. *See Brief upon Remand* at 14-16.

- **Careful Scrutiny of the Voir Dire Record, Including Side-by-Side Comparisons of Stricken African-American Jurors with Accepted White Jurors:** As Mr. Snyder argued, several of the prosecutor's proffered reasons for striking Jeffrey Brooks and Elaine Scott lack actual record support, thus belying their credibility. Moreover, a comparison of these jurors with white venire members accepted by the State similarly reveals that the race-neutral reasons proffered by the prosecutor were pretextual and that race was the determining factor in who was challenged and who was not. In addition, the prosecutor's strike of prospective jurors Gregory Scott and Thomas Hawkins (for which no race neutral reasons were proffered) appear unexplainable from the record, as their voir dire testimony showed them to be jurors more favorable to the State than several white jurors who were accepted by the State. *See Brief upon Remand* at 16-29.

- **Broader Patterns of Discriminatory Practice by Both Mr. Snyder's Prosecutors and the Jefferson Parish District Attorney's Office:** In his *Brief upon Remand*, Mr. Snyder argued that the prosecutor's invidious intent in striking African-American jurors was presaged by his pretrial comparisons of this case to the O.J. Simpson case and – before the all-white jury crafted from the prosecutor's use of peremptory challenges – came to fruition in the prosecutor's rebuttal closing argument that Mr. Snyder should receive the death penalty because his case was like O.J. Simpson's, where the defendant "got away with it." In addition, the pattern of practice in the Jefferson Parish District Attorney's Office clearly evinced that race discrimination is routine in that parish, as reflected in cases previously decided by the Louisiana Supreme Court;[13] a statistical analysis conducted in another Jefferson Parish case by

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[13] *See State v. Harris*, 820 So.2d 471, 474 (La. 2002) (finding *Batson* violation where Jefferson Parish prosecutor explained that she was striking African-American juror because he was a "single black male on the panel with no children . . . . I don't want him relating to the defendant more so than he would the State's part of the case"); *State v. Jacobs*, 789 So. 2d 1280 (La. 2001) (though reversing on other grounds, court rebuked the same judge who presided over Mr. Snyder's trial for the careless manner in which the

a Tulane University professor, who concluded that the racial disparity in the state's use of peremptory challenges strongly supports the claim that the Jefferson Parish District Attorney's Office engages in racially discriminatory jury selection practices;[14] and a climate of racial insensitivity illustrated by prosecutors' wearing of hanging-noose neckties in trial proceedings against African-American defendant Lawrence Jacob.[15] *See Brief upon Remand* at 29-38.

F. The Majority Opinion of the Louisiana Supreme Court

Although a slim majority of the Louisiana Supreme Court acknowledged the requirement that it review Mr. Snyder's "*Batson* complaints cumulatively in light of the entire record as directed by *Miller-El*," *Snyder III*, 942 So.2d at 486,[16] it actually refused to consider most of the evidence outlined above. Rather, the majority concluded that *Miller-El*, and this Court's decision in *Rice v.*

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judge considered the defendant's *Batson* challenges); *State v. Myers*, 761 So. 2d 498 (La. 2000) (reversing on grounds the trial court erred in failing to address the defendant's *Batson* challenges to the State's use of peremptory challenges to exclude six of seven African Americans). *See also State v. Bridgewater*, 823 So.2d 877 (La. 2002) (all-white jury seated after prosecutor used peremptory strikes to remove prospective black jurors); *State v. Neal*, 796 So.2d 649 (La. 2001) (prosecutor used strikes to remove three African Americans; one African American seated on jury); *State v. Taylor*, 781 So.2d 1205 (La. 2001) (prosecutor struck five African Americans, leaving one on jury); *State v. Lucky*, 755 So.2d 845 (La. 1999) (entire panel of jurors struck when juror accused prosecutor of using challenges to remove African-American women; resulting jury consisted of eleven whites and one black)(information regarding jury composition obtained from post-conviction investigator); *State v. Seals*, 684 So.2d 368 (La. 1996) (all-white jury seated after the prosecutor struck three African Americans over defendant's *Batson* objection); *State v. Durham*, 673 So.2d 1103 (La. Ct. App. 1996) (same).

[14] This study had been introduced into the trial court record following the Louisiana Supreme Court's reversal on *Batson* grounds in *State v. Harris*, *supra*, 820 So. 2d 471, and was included as an appendix in the writ application to the Louisiana Supreme Court in *State v. Harris*, Sup. Ct. No. 03-KK-3549.

[15] *See, e.g.*, Jeffrey Gettleman, *Prosecutors' Morbid Neckties Stir Criticism*, THE NEW YORK TIMES, 1/5/03, Section 1; Joe Darby, *Prosecutors' Choice of Neckties Blasted; Noose, Grim Reaper Worn in Murder Case*, THE TIMES PICAYUNE, 1/5/03.

[16] The majority initially engaged in a discussion of this Court's so-called "pendulous treatment" of the issue of race-based peremptory challenges, *Snyder III*, *supra*, 942 So. 2d at 487, describing this Court's analysis of the issue in *Swain v. Alabama*, 380 U.S. 202 (1965), *Snyder III*, *supra*, 942 So. 2d at 487-88, and characterizing *Batson* as the Court's "pendulum swing in the opposite direction," *id.* at 488, and *Miller-El* as "mov[ing] the pendulum back toward middle ground," *id.*

Collins, 546 U.S. 333 (2006), "do not require a detailed reconsideration of the voir dire of the five African-American prospective jurors peremptorily struck by the State." *Id.* at 492. As set forth below, the majority

- refused to consider any evidence relating to the pattern of practice in Jefferson Parish on grounds it was outside the appellate record;
- rejected any consideration of the statistical pattern raised by the prosecutor's use of peremptory challenges to strike 100% of the qualified African Americans, by whittling down its consideration of the strikes to analysis of the removal of only two prospective jurors;
- disregarded entirely the evidence revealing the pretextual nature of the prosecutor's reason for striking Elaine Scott; and
- dismissed as irrelevant the prosecutor's pretrial comments and penalty phase closing argument about O.J. Simpson because, "in context" the references were appropriate and "[n]either remark referred to Simpson's or Snyder's race," *Snyder III*, 942 So. 2d at 499.

In lieu of considering the evidence Mr. Snyder had assembled to establish proof of intentional discrimination, the majority once again deferred to the trial court's rejection of Mr. Snyder's *Batson* challenges – even though this entailed deference to the unexplained ruling of a trial judge the Louisiana Supreme Court had chastised for his careless treatment of *Batson* challenges during a 1998 capital trial[17] and acceptance of race neutral reasons offered by a prosecutor whose credibility was far from untarnished.[18]

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[17] *See State v. Jacobs*, 789 So. 2d 1280,1283, n.2 (La. 2001).

[18] Jim Williams, the lead prosecutor in this case, was one of the trial prosecutors in both *State v. Kyles*, 513 So. 2d 265 (La. 1987), and *State v. Thompson*, 516 So. 2d 349 (La. 1987) – both capital cases arising in Orleans Parish that were ultimately reversed on grounds the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963), in failing to disclose exculpatory evidence. *See Kyles v. Whitley*, 514 U.S. 419 (1995); *State v. Thompson*, 825 So. 2d 552 (La. App. 2002), *writ denied*, 829 So. 2d 427 (La. 2002).

Initially, the majority quickly dispatched the evidence Mr. Snyder had presented of the history of race discrimination in Jefferson Parish on grounds such evidence "would take us outside the four corners of the appellate record . . . ." *Id.* at 490 n. 8.[19] Accordingly, although the majority recognized that *Miller-El* cautioned that *Swain*'s focus on a prosecutor's historical use of peremptory challenges "should not have been consigned to history," *id.* at 488, it consigned the historical context of the prosecutor's actions in this case to the trash bin – even though much of the evidence arose from decisional law the Louisiana Supreme Court had itself issued (and which it routinely cites as precedent).

The majority, moreover, removed from its consideration for any purpose the prosecutor's use of peremptory challenges against three of the five African-American jurors, observing that "[t]he court's current task is eased by the winnowing out of some of the challenged jurors." The majority concluded it need not consider the strike of Loretta Walker for any purpose because Mr. Snyder, in the *Brief upon Remand*, did not raise arguments specifically addressing her removal. The majority also disregarded the prosecutor's strikes against Greg Scott and Thomas Hawkins for the reason set forth in its initial opinion – that any challenge to the prosecutor's use of peremptory challenges against these jurors had been waived by trial counsels' failure to raise *Batson* objections to their removal.[20] In assessing the evidence of discrimination, the court thus failed to consider either the

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[19] The majority's conclusion that evidence of the pattern of practice by Jefferson Parish prosecutors was "dehors the record," *id.*, disregarded the import of defense counsel's argument, at the pretrial hearing conducted on the motion in limine to preclude the prosecutor from comparing this case to O.J. Simpson's, that "[t]o play upon these fears and prejudices to what will doubtless be an overwhelmingly - if not all - white jury deciding a case with admitted similarities is an appeal to racism at worst and vigilante justice at best, and as such is specifically precluded by Louisiana law." R. 160.

[20] The majority observed that "[t]here is nothing in *Miller-El* or *Collins* that casts doubt on the correctness of this portion of *Snyder I*." *Id.* at 493. It further approved its initial holding that trial counsels' failure to object to the removal of Scott and Hawkins could not constitute ineffective assistance of counsel

statistical import of the prosecutor's use of peremptory challenges to remove *every* qualified African-American juror, or the significance of the prosecutor's acceptance of white jurors who appear, from the record, to have been less favorable to the State than Thomas Hawkins and Greg Scott.

Having whittled the issue down to two jurors, the majority proceeded to adopt its original decision; it noted that "[d]espite defense counsel's *reiteration* of the argument concerning the remaining two potential jurors, we turn to our previous decision regarding these persons," *id.* at 493 (emphasis supplied),[21] and then quoted extensively from its earlier opinion, *see id.* at 493-95 (quoting *Snyder I, supra*, 750 So. 2d at 840-42). Thereafter, the majority observed, "we . . . find nothing [in the voir dire transcript] to disparage the above quoted *Batson* analysis conducted by this court in *Snyder I*." *Id.* at 494.

Noting that "the peremptory challenge of Brooks requires a more detailed discussion than the challenge of Scott," the majority additionally addressed Mr. Snyder's post-remand argument that the prosecutor's reasons for striking Jeffrey Brooks were pretextual. It dismissed Mr. Snyder's comparative juror analysis of the prosecutor's claim that he struck Brooks because of his student teaching schedule, reasoning that the scheduling conflicts identified by prospective juror Sandras and seated juror Yaeger were distinguishable because, unlike Brooks, "both of these men were employed

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under *Strickland v. Washington*, 466 U.S. 668 (1984), "because the State's exclusion of Scott and Hawkins did not directly and fundamentally impact the integrity of the fact-finding process at trial." *Id.* at 493 n.13 (citing *Snyder I*, 750 So.2d at 842).

[21] Mr. Snyder's 38-page *Brief upon Remand* was not simply a "reiteration" of the *Batson* arguments initially raised in this case. Rather, its discussion of the issue was largely informed by the guidance this Court provided in *Miller-El*. The original brief, which was filed May 20, 1998, devoted six and a half pages to the *Batson* issue and did not, for instance, present a close analysis of the voir dire transcript or document the disparate treatment of African-American jurors *vis a vis* similarly situated white jurors.

and apparently already had established careers,"[22] *id.* at 496, and that McMurray's concerns with service were focused on childcare problems, rather than her court-reporting classes at Franklin College, *id.* at 496 n.16.[23] The majority also rejected Mr. Snyder's argument that the prosecutor's explanation that he struck Brooks because he appeared "very nervous" was belied by the absence of any confirmation by the trial judge, coupled with the engaged responses Brooks provided to questions from both parties. The majority reasoned that "the fact that Brooks was articulate during the voir dire may have contributed to the prosecutor's fear that he would get 'smart' during jury deliberation and suggest a verdict lesser than the death penalty," and that, because "nervousness cannot be shown from a cold transcript, . . . the judge's evaluation must be given much deference." *Id.* at 496.

Finally, the majority dismissed as irrelevant the prosecutor's pretrial comments and penalty phase argument comparing this case to the O.J. Simpson case. The majority did not even

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[22] Prospective juror Michael Sandras, a white male in the fifth panel, reported that he taught at the University of New Orleans and had "just started yesterday and it's the beginning of the semester; so any prolonged absence, it becomes a real problem." R. 982. He admitted that concern about his teaching obligations would cause him to have trouble concentrating and that he would "have to somehow pass on the information concerning work." *Id.* Despite Mr. Sandras' admitted concerns, the State never asked him a single question concerning his commitments and the extent to which he would be distracted or want to end the trial quickly by avoiding a penalty phase in order to "go home quickly." In fact, unlike for Mr. Brooks, there was not even a phone call made to the university to determine if Mr. Sandras could arrange to have his commitments covered.

White prospective juror Arthur Yaeger, also in the fifth panel, expressed concern with jury service because he had "a longstanding commitment to an event that's going to take place on Sunday that I've been an integral part of for many years." R. 983. The prosecutor did not question Mr. Yaeger about this and lodged no challenge against him. Rather, he was accepted by the State and sat on the jury.

[23] The majority as well dredged up questions the prosecutor had posed to a few jurors who had expressed scheduling problems to bolster the legitimacy of the prosecutor's concerns with Brooks' teaching obligations, *id.* at 495, even though the prosecutor did not ask Brooks a single question about the impact of his schedule on his ability to serve as a juror.

acknowledge the prosecutor's pretrial comments to the media comparing this case to O.J. Simpson's or Mr. Snyder's two motions seeking to quell such comments. *See supra*, at 3-4. Instead, it identified as the only example of the prosecutor's pretrial remarks his argument at a hearing conducted July 29, 1996, where the prosecutor had alluded to the case to support the admissibility of other crimes evidence. *See id.* at 497, R. 358. The majority, moreover, characterized the prosecutor's rebuttal phase argument that Mr. Snyder should be put to death because this case was like O.J. Simpson's, where the defendant "got away with it," R. 1593, as a proper response to defense counsel's statement in closing argument that Mr. Snyder had been suicidal when police officers arrived at his home.[24] *Snyder III*, 942 So. 2d at 498-99. The majority concluded that the prosecutor's O.J. Simpson comments did not evince discriminatory intent, observing:

> [O]ther than suggesting inferences to be drawn from the bare facts of the prosecutor's remarks, both prior to and subsequent to the voir dire, defense counsel points to no evidence in the record to substantiate defendant's claim of discriminatory use of peremptory challenges. The inferences defense counsel suggests are no more compelling than other race neutral inferences to be drawn when one considers the prosecutor's remarks in context. The remark at the motion in limine [sic] referred to the fact that the Simpson trial involved alleged domestic violence; the remark during rebuttal referred to the fact that Simpson feigned suicidal intent. *Neither remark referred to Simpson's or Snyder's race.*

Id. at 499 (emphasis supplied).[25]

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[24] As noted, *supra*, p. 9, n. 10, the prosecutor's argument that Mr. Snyder may have had O.J. Simpson's acquittal in mind when he purportedly feigned being suicidal was factually insupportable, as the O.J. Simpson verdict was not announced until close to two months after the offense for which Mr. Snyder had been charged.

[25] The majority further noted that "[c]ounsel's citations to authorities concerning the Simpson trial never were and are not now, part of the record before this court for review." *Id.* The majority presumably referred to published scholarship to which Mr. Snyder cited in his *Brief upon Remand*, *see* p. 31, as support for the argument defense counsel had made before the trial court that "[s]urveys conducted since the verdicts in the O.J. Simpson trial have shown consistently that a large majority of white Americans believe the not guilty verdicts were wrong; many indicate that the verdicts have undermined their faith in the entire jury system." R. 160. *See also* R. 1617-18 (defense counsel's argument at hearing on motion for new trial).

In concluding that Mr. Snyder had failed to prove intentional discrimination, the majority relied on this Court's decision in *Rice v. Collins*, 546 U.S. 333 (2006), a habeas corpus case analyzed under the AEDPA, to conclude that Mr. Snyder was not entitled to relief unless he could "demonstrate that a reasonable factfinder *must necessarily conclude* the prosecutor lied about his reasons for striking Scott or Brooks." *Snyder III, supra*, 942 So. 2d at 499 (emphasis supplied). Holding that Mr. Snyder "did not carry his ultimate burden of persuasion," the majority restated its original holding that "Snyder's 'proof, when weighed against the prosecutor's offered race-neutral reasons, was not sufficient to prove the existence of discriminatory intent.'" *Id.* at 500 (quoting *Snyder I*, 740 So. 2d at 842).

G. The Dissenting Views of Three Justices

Three justices, including Justice Kimball, the author of *Snyder I*, dissented in two separate opinions.

Justice Kimball, joined by Chief Justice Calogero, wrote that "a review of the entirety of this record performed using the vigorous analysis directed by the *Miller-El* Court reveals the trial court erred in allowing the State to peremptorily challenge Mr. Brooks." *Id.* at 100 (Kimball, J., dissenting). Justice Kimball initially observed that the "raw numbers," showing that the State used "'close to half' of its peremptory strikes to 'exclude an entire group comprising only fourteen percent of the qualified pool' is compelling evidence that the State's strikes were made on the impermissible basis of race." *Id.* She then noted that the "voir dire began against a backdrop of the issues of race and prejudice when the State made references to the O.J. Simpson's case," and that the prosecutor's pretrial assurances to the trial court "that he would not refer to O.J. Simpson during the voir dire and evidentiary portion of trial . . . appear disingenuous because the prosecutor clearly referenced the O.J.

Simpson case during its rebuttal argument at the penalty phase of trial." *Id.* at 501.

Moving on to address the prosecutor's removal of Jeffrey Brooks, Justice Kimball observed that, in light of the prosecutor's injection of racial issues, "it is only reasonable to conclude that Mr. Brooks was peremptorily challenged by the State on the basis of his race when the entirety of the facts is considered. This is especially true in light of the fact that the trial court did not articulate its reasons for overruling the *Batson* challenge." *Id.* The dissent commented that the State's use of a backstrike to remove Brooks was "suspicious," and that "[t]he suspicions raised by the circumstances surrounding the exercise of the backstrike are not eased when the voir dire of Mr. Brooks is considered alone or when it is considered along with that of other panelists." *Id.*

Justice Kimball proceeded to scrutinize the prosecutor's proffered reasons for striking Brooks in light of the voir dire record. She concluded that the prosecutor's failure to question Brooks about the impact of his teaching schedule on his ability to serve, and apparent lack of concern about the scheduling conflicts of other white prospective jurors, revealed that "there was no pre-strike foreshadowing of genuine State concern over the possibility of Mr. Brooks having time-schedule anxieties [and n]o attempt was made by the State to verify its hypothesis and develop an objective basis for its strike." *Id.* at 502. The dissent further observed that the prosecutor's explanation that it struck Brooks because he appeared "very nervous" lacked any corroboration in the record, in light of the trial court's failure to "verify[] the accuracy of the State's generalized and conclusory characterization" and the record-based indications "that Mr. Brooks was an engaged and voluble juror throughout voir dire examination." *Id.*[26]

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[26] As the dissent observed, "[i]n the absence of the trial court's independent and particularized assessment of Mr. Brooks's demeanor, a reviewing court can only look to the record, which seems to indicate a lack of nervousness and uncertainty on the part of Mr. Brooks." *Id.* at 503 (Kimball, J., dissenting).

Justice Kimball also considered the prosecutor's treatment of similarly situated white jurors. She noted the prosecutor's apparent lack of concern for the scheduling conflicts to which prospective juror Sandras and seated juror Yaeger testified, concluding that "the acknowledged time concerns of Mr. Sandras and Mr. Yaeger seem equally significant as the time concerns attributed to Mr. Brooks" and that "[t]he factor that calls the State's strike of Mr. Brooks into question is the total lack of interest prosecutors exhibited in the admitted time concerns of Mr. Brooks, Mr. Sandras and Mr. Yaeger until it needed to justify with race-neutral reasons its strike of Mr. Brooks." *Id.* at 504.

In conclusion, Justice Kimball observed:

> [T]he totality of the evidence discussed herein, combined with the lack of the trial court's active participation in voir dire and its failure to articulate particularized reasons for its determination that the State's proffered reasons were not pretextual, leads to the conclusion that the trial court's decision to allow the strike of Mr. Brooks was clearly erroneous. In my view, the cumulative evidence of pretext is compelling and too powerful to conclude [that] anything but intentional racial discrimination motivated the State's strike of Mr. Brooks.

Id. at 505.

Justice Johnson filed a separate dissenting opinion. She began by quoting liberally from her initial dissent in *Snyder I*, in which she had stressed that "the prosecutor's action in accepting the first African-American juror [Brooks] seems to have been a tactic to keep defense counsel from raising *Batson* challenges to the subsequent exclusions," and that "[t]he prosecutor's discriminatory intent in excluding all African-Americans from the jury was evidence by his reference to the O.J. Simpson trial during closing arguments." *Id.* at 506 (quoting *Snyder I*, 750 So. 2d at 866) (Johnson, J., dissenting)). Justice Johnson further observed that the prosecutor's use of a backstrike to remove Brooks in this case paralleled the Texas "jury shuffle" procedure this Court had found so suspicious in *Miller-El*. *Id.* at 508.

REASONS FOR GRANTING THE WRIT

I. The majority's decision to reinstate on remand from this Court its prior rejection of Mr. Snyder's claim that the prosecution had purposefully excluded African Americans from his capital jury in violation of *Batson* so conflicts with the decision and analysis of *Miller-El v. Dretke* that this Court's intervention under Supreme Court Rule 10(c) is required.

In *Miller-El v. Cockrell*, 537 U.S. 322 (2003) ("*Miller-El I*"), this Court reversed the Fifth Circuit's denial of a certificate of appealability to review Thomas Miller-El's claim that the prosecutors in his capital trial had violated *Batson v. Kentucky*, 476 U.S. 79 (1986). On remand, the Fifth Circuit chose to ignore this Court's guidance regarding the proper analysis of the evidence presented to establish that the state had discriminated on the basis of race in exercising peremptory challenges. *Miller-El v. Dretke*, 361 F.3d 849 (5th Cir. 2004). This Court granted *certiorari* a second time and, following careful consideration of the evidence the Fifth Circuit had either disregarded or misconstrued, reversed. *Miller-El v. Dretke*, 545 U.S. 231 (2005) ("*Miller-El II*").

Here, a bare majority of the Louisiana Supreme Court displayed comparable recalcitrance after this Court remanded for further consideration of Mr. Snyder's *Batson* claims in light of *Miller-El II*. The majority's decision to follow in the Fifth Circuit's footsteps, rather than to engage in the exacting scrutiny that *Miller-El II* requires, merits the same response from this Court that the Fifth Circuit received. Mr. Snyder respectfully submits that *certiorari* should once again be granted, this time to review the Louisiana Supreme Court's judgment on the merits.[27]

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[27] The case of *Hightower v. Terry*, Sup. Ct. No. 06-06-1209, currently pending before this Court, similarly seeks review of the 11th Circuit's decision to affirm following this Court's remand for further consideration in light of *Miller-El II*. *See Hightower v. Schofield*, 545 U.S. 1124 (2005); *Hightower v. Terry*, 459 F.3d 1067 (11th Cir. 2006).

A. The Louisiana Supreme Court's majority opinion paid lip service to this Court's Order requiring it to reconsider the merits of Mr. Snyder's *Batson* claim in light of *Miller-El v. Dretke* by once again ignoring highly probative evidence that the prosecutor intentionally struck qualified African-American prospective jurors on the basis of their race.

This Court's decision in *Miller-El II* broke no new ground.[28] Instead, the Court undertook to apply *Batson*'s directive that "[i]n deciding if the defendant has carried his burden of persuasion [in proving the prosecutor's discriminatory intent], a court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Batson, supra*, 476 U.S., at 93 (quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977)).[29] In doing so, *Miller-El II* recognized the continuing vitality of *Batson* and provided forceful clarification of the analysis that courts must undertake, pursuant to *Batson*, to determine whether a prosecutor has exercised peremptory challenges on the impermissible basis of race.[30]

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[28] *See, e.g., Boyd v. Newland*, 467 F.3d 1139, 1146 (9th Cir. 2006) (citing *Murphy v. Dretke*, 416 F.3d 427, 439 (5th Cir. 2005)); Amanda S. Hitchcock, *"Deference Does Not by Definition Preclude Relief": The Impact of Miller-El v. Dretke on Batson Review in North Carolina Capital Appeals*, 84 N.C.L. Rev. 1328, 1330 (2006).

[29] *Batson* established a tripartite structure for determining whether a prosecutor's exercise of peremptory challenges was impermissibly based on race. Once a defendant presents a *prima facie* case of racial discrimination in the State's exercise of a peremptory challenge, the burden shifts to the State to come forward with a race neutral reason for its strike. The trial court must then "determine if the defendant has established purposeful discrimination." *Batson, supra*, 476 U.S., at 98. This case involves solely the third step of the *Batson* inquiry.

[30] The *Miller-El* Court chastised the Fifth Circuit for its failure to consider all relevant evidence in reviewing the state courts' rejection of Miller El's claim of discrimination in the selection of his jury. The Court specifically clarified that, if *Batson* is to have any teeth at all, it is incumbent upon a reviewing court to consider more than the race-neutrality of the reason proffered to rebut a *prima facie* case of discrimination:

> If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*. Some stated reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand. Hence *Batson's* explanation that a defendant may rely on "all relevant circumstances" to raise an inference of purposeful discrimination. 476 U.S., at 96-97, 90 L. Ed. 2d 69, 106 S. Ct. 1712.

In remanding Mr. Snyder's case for further consideration in light of *Miller-El*, this Court accordingly directed more than "a somewhat expanded review of defendant's *Batson* claims"[31] – a review that, in fact, the Louisiana Supreme Court majority did not even undertake. Rather, the remand implicitly repudiated the lower court's initial *Batson* analysis and demanded more than a perfunctory reinstatement, with minor variations, of the Louisiana Supreme Court's original opinion.

In every particular, the Louisiana Supreme Court majority rejected the instruction this Court provided in *Miller-El II*.

In *Miller-El*, this Court commenced its analysis with an examination of the statistics, concluding that the Dallas County prosecutor's use of peremptory strikes to exclude 91% of the eligible African-American venire members was "remarkable" and that "[h]appenstance is unlikely to produce" such a result. *Id.* at 241.[32]

In this case, however, rather than considering as evidence of discriminatory intent that the prosecutor used peremptory challenges to remove *100%* of the qualified black jurors in Mr. Snyder's case, a majority of the Louisiana Supreme Court disregarded the statistics by claiming that only two of the prosecutor's five peremptory strikes against African Americans were properly at issue.[33]

Id. at 240.

[31] *Snyder III*, *supra*, 942 So. 2d at 492.

[32] The Court considered the overall statistics even though it limited its analysis of the prosecutor's peremptory challenges to two of the ten struck jurors, noting that, "while other black members of the venire [were] struck purportedly because of some ambivalence, about the death penalty or their capacity to impose it . . . these are closer calls [and t]here is no need to go into these instances, for the prosecutor's treatment of Fields and Warren supports stronger arguments that *Batson* was violated." *Id.* at 252 n.11.

[33] The majority moreover did not consider as proof of discriminatory intent that the prosecutor had peremptorily struck African Americans Gregory Scott and Thomas Hawkins, even though their voir dire testimony showed them to be jurors more favorable to the State than white jurors the State accepted. Regardless of whether the Louisiana Supreme Court correctly held that trial counsel's failure to raise *Batson*

The *Miller-El II* Court also scrutinized the prosecutor's proffered reasons for challenging two of the stricken African-American jurors in light of the voir dire record. Critical to the Court's analysis were side-by-side comparisons of these African-American venire persons against accepted white venire persons – analysis the Court found "[m]ore powerful than the[] bare statistics." *Id.* The Court explained that "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." *Id.* Whether the state conducted any meaningful voir dire on the purported race-neutral reason, whether the state objected to non-African-American venire persons who shared the complained-of characteristic, and whether the state's proffered reasons found record support were all factors the Court considered in determining the credibility *vel non* of the race-neutral reasons proffered by the state. *See id.* at 2325-32. Based on its scrutiny of the prosecutor's proffered reasons in light of the voir dire record, the Court found compelling bases to conclude that the prosecutor had struck prospective jurors Fields and Warren because of their race. *Id.* at 2329, 2332.

Contrary to *Miller-El II*'s instruction, however, the majority here largely ignored or mischaracterized the record. With respect to prospective juror Elaine Scott, the majority eschewed any meaningful analysis of the voir dire transcript, instead simply adopting verbatim its original

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objections to the removal of these two jurors waived any *Batson* claims as to them, *see infra* at Section II, the majority erred in failing to consider the prosecutor's actions as relevant evidence of discriminatory intent *vis a vis* preserved *Batson* challenges. In *Kesser v. Cambra*, 465 F.3d 351, 369 n.6 (9th Cir. 2006) (en banc), for example, the Ninth Circuit considered the prosecutor's racially biased comments about the removal of a prospective juror, even though a *Batson* challenge to her removal had not been preserved, observing that "[n]evertheless, at least some of [the prosecutor's] testimony about Nakata is relevant here, because it indicates possible racial animus and so lends support to Kesser's argument that the prosecutor employed racial stereotypes throughout the jury selection."

opinion finding that the prosecutor's proffered reasons for striking her were race neutral on their face and deferring to the trial court's unexplained ruling denying the *Batson* challenge. *See Snyder III*, *supra*, 942 So. 2d at 493-95 (quoting *Snyder I*, *supra*, 750 So.2d at 840-42). Although the majority did engage in ostensibly closer scrutiny of the prosecutor's challenge to prospective juror Jeffrey Brooks, it went out of its way to distinguish similarly situated white jurors on the basis of superficial differences the State had not even suggested;[34] dredged up questions the prosecutor had posed to a few jurors about declared hardships as a means of legitimizing one of the prosecutor's proffered reasons for striking Brooks (even though the prosecutor did not ask Brooks single question about the issue); and turned on its head the evidence that Brooks, contrary to the prosecutor's contention, was not "very nervous" by claiming that the record of his "articulate" voir dire responses "may have contributed to the prosecutor's fears that he would 'get smart' during jury deliberation and suggest a verdict less than the death penalty." *Snyder III*, *supra*, 942 So. 2d at 496. The majority further concluded that the prosecutor's description of Brooks's "nervous" affect was unreviewable because "nervousness cannot be shown from a cold transcript"; thus "only the trial judge can evaluate the

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[34] The *Miller-El* Court rejected the dissenting opinion's argument "that there are no white panelists similarly situated to Fields and to panel member Joe Warren because '"[s]imilarly situated" does not mean matching any one of several reasons the prosecution gave for striking a potential juror – it means matching *all* of them.'" *Id.* at 247 n.6 (quoting dissent, 545 U.S., at 291). The Court explained:

> None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one. Nothing in the combination of Fields's statements about rehabilitation and his brother's history discredits our grounds for inferring that these purported reasons were pretextual. A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.

Id.

demeanor of the juror and . . . the judge's evaluation must be given great deference." *Id.*[35]

Finally, the *Miller-El* Court bolstered its conclusions by looking to "broader patterns of practice" that evinced discriminatory intent, reviewing not only actions by the prosecutor during the jury selection of the case, but general and systemic patterns of discriminatory practice by the District Attorney's Office itself. *Miller-El II, supra*, 545 U.S., at 253. The Court found that the prosecutor's discriminatory intent was evinced by examples of conduct particular to Miller-El's case, observing that "[t]he prosecution's shuffling of the venire panel, its enquiry into views on the death penalty, its questioning about minimum acceptable sentences: all indicate decisions probably based on race." *Id.* Just as relevant and significant in determining purposeful discrimination, the Court found, was evidence of the history of the Dallas County District Attorney's Office and its specific policy of systematically excluding African Americans from juries. *Id.* at 263-64.

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[35] Although the majority refused to consider the record of Brooks's voir dire testimony to assess the legitimacy of the prosecutor's explanation that Brooks was challenged because he appeared nervous, the Ninth Circuit relied on the voir dire record to scrutinize the prosecutor's justification for striking a juror on grounds she appeared "pretentious" and "self-important," concluding the prosecutor's proffered reason was specious in light of this juror's actual testimony:

> The prosecutor's explanation not only fails a comparative analysis, it is inconsistent with Rindels's own testimony. She did not tout her qualifications, but simply explained matter-of-factly that it would be hard for her to serve because she was "the only qualified individual at my work place to complete an application to HUD" and that the application had an impending due date. As was clear from her written questionnaire, Rindels was the office manager for a tribe and had held that job for twelve years, so it seems quite unlikely that her explanation on the hardship form was mere hubris. *Such intangibles as voice inflection and body language are impossible to judge from a cold transcript, but her answers at the hardship hearing hardly sound "pretentious" or "self-important," and the prosecutor never referred to concerns about the intangibles.* Unlike the teachers in the pool, she did not expound on her irreplaceability or reiterate complaints about leaving work once it was clear that the HUD application would not create a conflict.

Kesser, supra, 465 F.3d at 363 (emphasis supplied).

A majority of the Louisiana Supreme Court, however, rejected such evidence in its entirety. The majority mischaracterized the prosecutor's pretrial and trial references to the O.J. Simpson case as appropriate responses, which carried no indication of racial animus because "[n]either remark referred to Simpson's or Snyder's race." *Snyder III*, 942 So. 2d at 499. It refused to consider, as outside the appellate record, any evidence that the Jefferson Parish District Attorney's Office routinely engaged in the racially biased use of peremptory challenges, even though much of that evidence arose in cases the court itself had decided.

In *Miller-El II*, this Court concluded that the entirety of the evidence of the use of peremptory strikes by the prosecutor, when viewed cumulatively, led in a direction "too powerful to conclude anything but discrimination" against African Americans. *Id.* at 265. As the Court found:

> It blinks reality to deny that the State struck Fields and Warren, included in that 91%, because they were black. The strikes correlate with no fact as well as they correlate with race, and they occurred during a selection infected by shuffling and disparate questioning that race explains better than any race-neutral reason advanced by the State. The State's pretextual positions confirm Miller-El's claim, and the prosecutors' own notes proclaim that the Sparling Manual's emphasis on race was on their minds when they considered every potential juror.

Id. at 266.

By contrast, a majority of the Louisiana Supreme Court, much like the Fifth Circuit in *Miller-El*, *supra*, 361 F.3d 849, reached the opposite conclusion by systematically erasing from its consideration the evidence that, when viewed cumulatively, so powerfully points in the direction of discrimination. Mr. Snyder respectfully submits that *certiorari* should be granted to correct the Louisiana Supreme Court's misguided application of *Miller-El II*.

B. The Louisiana Supreme Court erred in importing the standard of review applied in the AEDPA habeas proceeding of *Rice v. Collins*, to review Mr. Snyder's *Batson* claim on direct appeal

As a means of bolstering its flawed consideration of the proof evincing the prosecutor's discriminatory intent, a majority of the Louisiana Supreme Court relied on this Court's decision in *Rice v. Collins*, 546 U.S. 333 (2006), to conclude that the trial court's *Batson* findings were unassailable unless "a reasonable factfinder *must necessarily conclude* the prosecutor lied about his reasons for striking Scott or Brooks." *Snyder III*, 942 So.2d at 499 (emphasis supplied). As the majority observed, a finding in Mr. Snyder's favor "would be an improper substitution of this court's evaluation for that of the trial court similar to that struck down in *Collins* . . . ." *Id.* (citing *Collins*, *supra*, 546 U.S., at 973).[36]

The majority erred in importing into this direct appeal case the highly deferential standard of review applied by federal courts to assess state court judgments under the AEDPA. "The principle that collateral review is different from direct review resounds throughout our habeas jurisprudence." *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993). As the Court explained:

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[36] Earlier in its opinion, the majority observed that in *Collins*:

> The Supreme Court reversed, finding the Court of Appeals had "improperly substituted its evaluation of the record for that of the state trial court." *Collins*, 546 U.S. at _, 126 S. Ct. at 973. The Court found the record did not demonstrate that a *reasonable factfinder must necessarily conclude* the prosecutor lied about his reasons for striking the panelist. *Id.* at 975.
>
> Thus, the most recent admonition by the Supreme Court on jury selection after *Batson* focuses, not on a reviewing court's stringent parsing of a prosecutor's race-neutral reasons to ferret out pretext masking discriminatory intent, but on the leeway a reviewing court must grant a trial court in its evaluation of the credibility of the prosecutor in the third step of the *Batson* analysis.

Id. at 492 (emphasis supplied).

> Direct review is the principal avenue for challenging a conviction. "When the process of direct review – which, if a federal question is involved, includes the right to petition this Court for a writ of *certiorari* – comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials.

Id. (quoting *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983)). In light of this distinction, "'an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.'" *Id.* at 634 (quoting *United States v. Frady*, 456 U.S. 152, 165 (1982) (internal citation omitted)).

Subsequent to *Brecht*, Congress enacted the AEDPA, which defines the standard of review federal courts must apply in considering state court judgments in habeas corpus proceedings, and precludes relief unless the petitioner establishes that the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. 2254(d).

As this Court itself acknowledged in *Collins*, the standards for reviewing a *Batson* claim on direct appeal and in federal habeas proceedings are distinct:

> On direct appeal in federal court, the credibility findings a trial court makes in a *Batson* inquiry are reviewed for clear error. . . . Under AEDPA, however, a federal habeas court must find the state-court conclusion "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Thus, a federal habeas court can only grant Collins' petition if it was unreasonable to credit the prosecutor's race-neutral explanation for the *Batson* challenge. State-court factual findings, moreover, are presumed correct; the petitioner has the burden of rebutting the presumption by "clear and convincing evidence." § 2254(e)(1).

Collins, *supra*, 546 U.S. 333 (citation omitted).[37] Prior to its decision in this case, the Louisiana Supreme Court routinely applied the clearly erroneous standard to third-step *Batson* claims on direct review. *See, e.g.*, *State v. Scott*, 921 So. 2d 904, 944 (La. 2006); *State v. Dunn*, 831 So. 2d 862, 869 (La. 2002); *State v. Tyler*, 723 So. 2d 939, 943 (La. 1998).

"A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Sawyer v. Whitley*, 505 U.S. 333, 346 n.14 (1992) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948), and *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)).[38] This standard is less burdensome than one that requires reversal only if a reasonable factfinder would be *compelled* to find error.

Taking its cue from *Collins*, a majority of the Louisiana Supreme Court concluded, in essence, that *Batson* claims are inherently unreviewable, because reversal would constitute an impermissible substitution of the reviewing court's judgment for that of the trial judge. Yet, as the Court stressed in *Miller-El II*, itself a habeas case, even AEDPA's standard, though "demanding[, is] not insatiable; as we said the last time this case was here, '[d]eference does not by definition preclude relief.'" *Miller-El II*, *supra*, 545 U.S., at 240 (quoting *Miller-El I*, *supra*, 537 U.S., at 340). As the standard for reviewing Mr. Snyder's direct appeal claim is less onerous than that applied in

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[37] Although *Collins* referenced the standard for reviewing *Batson* claims on direct appeals in federal courts, which are governed by the standard codified in Fed.R.Civ.P. 52(a), *see, e.g.*, *Maine v. Taylor*, 477 U.S. 131, 145 (1986), the Court in *Hernandez v. New York*, 500 U.S. 352, 369 (1995), itself applied the "clearly erroneous" standard to direct review of a state court's determination of *Batson*'s third-step.

[38] *See, e.g.*, *Hernandez v. Bunge Corp.* 814 So. 2d 783, 793 (La. App. 2002) ("A factual finding is clearly erroneous 'when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'") (quoting *Zapata Haynie Corp. v. Arthur*, 980 F.2d 287 (5th Cir. 1992)).

Miller-El and *Collins*, the Louisiana Supreme Court majority's excuse that deference tied its hands rings hollow.

II. The Louisiana Supreme Court erred in holding that trial counsel can never be found ineffective for failing to raise a meritorious *Batson* challenge because *Batson* error does not affect the reliability of the verdict and thus cannot prejudice the defense.

In rejecting consideration of the prosecutor's use of peremptory challenges to remove Greg Scott and Thomas Hawkins, the Louisiana Supreme Court held that any *Batson* challenge to these strikes had been waived and that trial counsels' failure to object could not meet the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984), because *Batson* error "[does] not directly and fundamentally impact the integrity of the fact-finding process at trial." *Snyder III*, *supra*, 942 So. 2d at 493 n.13 (citing *Snyder I*, *supra*, 750 So. 2d at 842)). In so holding, the Louisiana Supreme Court has, in effect, made a determination that no defendant can ever prevail on a claim of ineffective assistance of counsel based on the failure of trial counsel to object under *Batson*, regardless of the merits of the *Batson* challenge.

Whether trial counsel's failure to raise a meritorious *Batson* challenge may constitute ineffective assistance of counsel – i.e. the application of *Strickland*'s prejudice prong to this type of error – is an important question about which courts are in substantial disagreement. In contrast to the Louisiana Supreme Court's decision here, several courts have held that ineffective assistance of counsel claims based on counsel's failure to raise a *Batson* challenge in the trial court are cognizable under either a modified version of *Strickland*'s prejudice prong or by applying a presumption of prejudice, given the structural nature of the error.[39]

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[39] *See, e.g., Gov't of the Virgin Islands v. Forte*, 865 F.2d 59, 64 (3rd Cir. 1989) (holding trial counsel's deficient performance in failing to raise *Batson* objections prejudiced defendant and observing that "[w]hile . . . ordinarily the *Strickland* principles are advanced when the contention is made that the trial

There are sound reasons why *Strickland*'s prejudice prong should not be applied so strictly to claims that trial counsel was ineffective in failing to raise *Batson* objections to the prosecutor's discriminatory exercise of peremptory challenges.

First, for well over a century, this Court has recognized the significant harm that arises when state actors engage in discrimination in violation of the Equal Protection Clause. *See, e.g., Strauder v. West Virginia*, 100 U.S. 303 (1880). As this Court observed more recently, "racial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' and places the fairness of a criminal proceeding in doubt." *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (citing *Rose v. Mitchell*, 443 U.S. 545, 556 (1979)). Jurors who have been excluded because of their race suffer the "stigma or dishonor [that] results if a prosecutor uses the raw fact of skin color to determine the objectivity or qualifications of a juror," *id.* at 410, and "a profound personal humiliation heightened

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cannot be relied upon to have produced a just result, we see no logical reason why they should not be applicable when the defendant was denied a just result on appeal because of the ineffectiveness of his attorney at the trial"); *Davidson v. Gengler*, 852 F. Supp. 782, 783 (W.D.Wis. 1994) ("the correct application of the *Strickland* . . . test for determining prejudice on an ineffective assistance claim is not whether the outcome of the trial would have been different, but to ask whether the results of jury selection process would have been different had a *Batson* objection been made); *Ex parte Yelder*, 575 So.2d 137, 139 (Ala. 1991) (holding that "the failure of trial counsel to make a timely *Batson* objection to a prima facie case of purposeful discrimination by the State in the jury selection process through its use of peremptory challenges is presumptively prejudicial to a defendant."); *Triplett v. State*, 666 So.2d 1356, 1362 (Miss. 1995) (adopting the standard set forth in *Yelder, supra*); *State v. Taylor*, 679 N.W.2d 893, 900 (Wis. App. 2004) ("[I]n order to show prejudice, [defendant] must establish that had trial counsel made the *Batson* objection, there is a 'reasonable probability' that it would have been sustained and the trial court would have taken the appropriate curative action."); *see also Davis v. Sec'y for the Dept. of Corr.*, 341 F.3d 1310, 1316 (11th Cir. 2003) ("when a defendant raises the unusual claim that trial counsel, while efficacious in raising an issue, nonetheless failed to preserve it for appeal, the appropriate prejudice inquiry asks whether there is a reasonable likelihood of a more favorable outcome on appeal had the claim been preserved); *but see Reed v. Norris*, 195 F.3d 1004, 1006 (8th Cir. 1999) ("We find it unnecessary to discuss the reasonableness of counsel's conduct [in failing to pursue *Batson* claim] because, given the overwhelming evidence of Reed's guilt presented at trial, we find that it would be impossible for him to demonstrate prejudice under *Strickland*."); *Batiste v. State*, 888 S.W.2d 9, 15 (Tex. Ct. Crim. App. 1994) ("[W]e do not think failure to preserve *Batson* error so invariably detracts from the fairness of trial as to justify exempting it from the 'prejudice' prong of *Strickland*. The possibility of racial prejudice in the selection of the petit jury affects the adversarial presentation of the case not at all.").

by its public character," *id.* at 413-14. A state's discrimination based on race in the jury selection process "strikes at the fundamental values of our judicial system and our society as a whole" and denies a defendant equal protection of the law in violation of the Fourteenth Amendment. *Rose* v. *Mitchell*, 443 U.S. 545, 556 (1979). In light of this substantial harm, this Court has granted relief under *Batson* without any inquiry into prejudice. *See, e.g., Miller-El II, supra*, 545 U.S. 231; *Powers, supra*, 499 U.S. 400; *Batson, supra*, 476 U.S. 79; *see also Vasquez v. Hillery*, 474 U.S. 254, 263 (1986) (conviction does not "cure the taint" of intentional discrimination to exclude African Americans from grand jury and such error requires automatic reversal).[40]

Second, and more important, a literal application of *Strickland*'s prejudice-prong would require "proof and acceptance of the notion that race can be a proxy for juror proclivities, which is the inference that *Batson* explicitly condemns." Note, *Constitutional Law - Equal Protection - Seventh Circuit Denies a Criminal Defendant's Objection to His Counsel's Race-based Peremptory Challenge - United States v. Boyd, 86 F.3d 719 (7th Cir. 1996)*, 110 Harv. L. Rev. 1334, 1337 (1997). As the Eleventh Circuit Court of Appeals has observed:

> [W]e are troubled by the practical implication of [*Strickland*'s prejudice prong] when the alleged deficient performance is failure to raise a *Batson*-type claim at trial or on appeal. How can a petitioner ever demonstrate that the racial make-up of the jury that convicted him affected its verdict? Furthermore, in requiring a petitioner to

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[40] Although this Court has yet to address this specific issue, numerous courts (including the Louisiana Supreme Court) have concluded that *Batson* error is structural in nature and accordingly not amenable to harmless error analysis. *See, e.g., Becht v. United States*, 403 F.3d 541, 547 (8th Cir. 2005) (citing *Neder v. United States*, 527 U.S. 1, 8 (1999)); *United States v. McFerron*, 163 F.3d 952, 956 (6th Cir. 1998) (stating that erroneous combination of second and third steps of Batson which resulted in denial of valid peremptory challenge resulted in structural error and new trial); *Tankleff v. Senkowski*, 135 F. 3d 235, 248 (2nd Cir. 1988) ("Because the effects of racial discrimination during voir dire may persist through the whole course of the trial proceedings, we hold that a *Batson/Powers* claim is a structural error that is not subject to harmless error review." (internal quotes and citations omitted); *Rosa v. Peters*, 36 F.3d 625, 634 n.17 (7th Cir. 1994) (holding that *Batson* violation not "trial error" subject to harmless error analysis) (citation omitted); *State v. Harris*, 820 So. 2d 471, 477 (La. 2002).

> make such a showing, we are asking that he convince us of the very conclusion that *Batson* prohibits: that the race of jurors affects their thinking as jurors. . . .
>
> Perhaps in this context we should follow Supreme Court precedent in cases where racial discrimination has altered the composition of the indicting grand jury by "reversing the conviction . . . without inquiry into whether the defendant was prejudiced in fact by the discrimination."

Eagle v. Linahan, 279 F.3d 926, 943 (11th Cir. 2001). These concerns should give pause in considering how *Strickland*'s ineffective assistance of counsel test should be tailored to accommodate claims that trial counsel's deficient performance resulted in a jury-selection process tainted by race discrimination.[41]

The Louisiana Supreme Court's holding that trial counsel's failure to raise meritorious *Batson* objections can never result in harm contradicts the long-established principle that an equal protection violation in the jury selection process so corrupts the integrity of the proceedings and places fairness in doubt, that any resulting conviction must be reversed. The determination of whether prejudice resulted from deficient performance in failing to raise a *Batson* claim necessarily involves a review of the merits of the *Batson* claim itself. If the *Batson* challenge would have been successful, not only has the defendant's Sixth Amendment right to counsel been abridged, but he has been denied the equal protection of the law. Accordingly, Mr. Snyder respectfully submits that this Court should grant *certiorari* in order to address the appropriate standard for analyzing a claim that trial counsel was ineffective in failing to raise a meritorious challenge to the prosecutor's use of peremptory challenges on the invidious basis of race.

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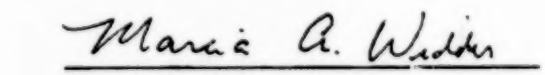
[41] It is ironic that a different outcome would result were a meritorious *Batson* claim waived, not at the trial level, but on appeal. *See, e.g., Bowen v. Foltz*, 763 F.2d 191, 194 (6th Cir. 1985) (restating the prejudice component of *Strickland* to require a showing of a reasonable probability that the result of the appeal would have been different). *Accord Bell v. Lockhart*, 795 F.2d 655, 657-58 (8th Cir. 1986); *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1985); *Schwander v. Blackburn*, 750 F.2d 494, 502 (5th Cir. 1985).

CONCLUSION

For the foregoing reasons, Mr. Snyder respectfully requests that a writ of *certiorari* issue to review the judgment of the Louisiana Supreme Court in this matter.

Respectfully submitted,



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APPENDIX A

Building restrictions are a means of insuring the lasting aesthetic and monetary value of property. They involve a scheme or plan of which all prospective purchasers are aware. *Chambless v. Parker*, 38,276 (La.App. 2 Cir. 3/3/04), 867 So.2d 974, 978; *4626 Corp. v. Merriam*, 329 So.2d 885 (La. App. 1 Cir.), *writ denied*, 332 So.2d 800 (La.1976). A cursory reading of the building restrictions in the present case would have alerted any prospective purchaser that the developer reserved the right to approve any of the subdivision lots for commercial use. In this regard, I further find the majority's reliance on *Oakbrook Civic Ass'n v. Sonnier*, 481 So.2d 1008 (La.1986), misplaced and factually distinguishable. Although this Court approved the use of neighborhood committees to approve certain construction plans in *Oakbrook*, in the present case the Kings reserved to themselves, in the restrictions, the option of granting a variance for commercial use, which reservation clearly negated a finding of a general plan as required by the pertinent provisions of the civil code. This vastly differs from the procedure approved in *Oakbrook*.

For the foregoing reasons, I would affirm the court of appeal on other grounds, dismiss the plaintiffs' action based upon the violation of building restrictions, dissolve the preliminary injunction granted in the trial court, and remand the matter to the trial court for consideration of the issues related to the plaintiffs' contention that they are also entitled to damages and the issuance of an injunction grounded on the law of nuisance.

1998-1078 (La. 9/6/06)

STATE of Louisiana

v.

Allen SNYDER.

No. 1998–KA–1078.

Supreme Court of Louisiana.

Sept. 6, 2006.

Rehearing Denied Dec. 15, 2006.

Background: Defendant was convicted in the Twenty-Fourth Judicial District Court, Parish of Jefferson, No. 98-KA-1078, Kernan A. Hand, J., of first-degree murder and was sentenced to death. Defendant appealed. The Supreme Court, 750 So.2d 832, conditionally affirmed, and remanded case. On remand, the District Court determined that a retrospective determination of competency was possible and that defendant was, in fact, competent to stand trial. Defendant appealed. The Supreme Court, 874 So.2d 739, affirmed. Granting defendant's petition for a writ of certiorari, the United States Supreme Court vacated the judgment and remanded for further consideration.

Holding: The Supreme Court, Weimer, J., held that defendant failed to carry his ultimate burden of persuasion that the State exercised peremptory challenges in a purposefully discriminatory manner.

Affirmed.

Calogero, C.J., dissented for reasons assigned by Kimball, J.

Kimball, J., dissented and assigned reasons and would grant a rehearing.

Johnson, J., dissented and assigned reasons and would grant a rehearing.

1. Constitutional Law ⇨221(4)

The Equal Protection Clause of the United States Constitution prohibits engaging in purposeful discrimination on the

grounds of race in the exercise of peremptory challenges. U.S.C.A. Const.Amend. 14.

2. Jury ⇐33(5.15)

The race-neutral explanation for exercising a peremptory challenge need not be persuasive or even plausible; it will be deemed race-neutral unless a discriminatory intent is inherent in the explanation.

3. Jury ⇐33(5.15)

The ultimate burden of persuasion as to racial motivation in exercising a peremptory challenge rests with, and never shifts from, the opponent of the peremptory challenge.

4. Criminal Law ⇐1158(3)

The trial court's findings with regard to a *Batson* challenge are entitled to great deference on appeal.

5. Jury ⇐33(5.15)

When a defendant voices a *Batson* objection to the State's exercise of a peremptory challenge, the finding of the absence of discriminatory intent depends upon whether the trial court finds the prosecutor's race-neutral explanations to be credible; credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.

6. Criminal Law ⇐1158(3)

In the context of a direct review of a *Batson* issue, the trial court's decision on the ultimate question of discriminatory intent by the State is a finding of fact accorded great deference, which finding will not be overturned unless clearly erroneous; deference is necessary because a reviewing court, which analyzes only the transcripts from voir dire, is not as well positioned as the trial court is to make credibility determinations.

7. Jury ⇐33(5.15)

Focus of the *Batson* framework is to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process.

8. Jury ⇐33(5.15)

Capital defendant failed to carry his ultimate burden of persuasion that the State exercised peremptory challenges against two African–American prospective jurors in a purposefully discriminatory manner; prosecutor's reasons for striking first juror were that he appeared "very nervous" throughout questioning and that he would be missing class, as a student teacher, if chosen to serve on the jury, prosecutor struck second juror because "she was very weak on her ability to consider the imposition of the death penalty," prosecutor's demeanor was evaluated by the trial court which found no discriminatory intent, and these explanations were reasonable and the proffered rationale had some basis in accepted trial strategy.

Capital Appeals Project, Jelpi P. Picou, Jr., Marcia A. Widder, Aneel L. Chablani, for applicant.

Charles C. Foti, Jr., Attorney General, Paul D. Connick, Jr., District Attorney, Terry M. Boudreaux, James A. Williams, Alfred A. Olinde, Jr., Assistant District Attorneys, for appellee.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

WEIMER, Justice.*

[1]Defendant was convicted of first degree murder and sentenced to death. On direct appeal, this court ultimately affirmed defendant's conviction and sentence. Currently, the case is on remand from the United States Supreme Court, which directed that we again review defendant's *Batson* claims, this time in light of *Miller–El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005). After reviewing defendant's *Batson* complaints cumulatively in light of the entire record as directed by *Miller–El*, we find the trial court did not err in determining the veni-repersons were not excused by the State in a racially discriminatory manner. Therefore, for the reasons that follow, the judgment affirming defendant's conviction and sentence is reinstated.

[2]FACTS AND PROCEDURAL HISTORY

Defendant was indicted in Jefferson Parish for the first-degree murder of Howard Wilson.[1] On June 28, 1996, defense counsel was notified in writing that the State was seeking the death penalty. A trial was subsequently held. During voir dire, defendant charged that the State exercised several of its peremptory challenges against African–American prospective jurors in a racially discriminatory manner in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The trial court denied defendant's *Batson* challenges. Consequently, defendant, who is African–American, was tried by an all-white jury. On August 29, 1996, the jury found defendant guilty as charged. After finding the presence of one aggravating circumstance,[2] the same jury unanimously determined defendant should receive the death penalty. The trial court subsequently imposed a sentence of death.

Defendant appealed his conviction and sentence directly to this court pursuant to La. Const. art. V, § 5(D), which provides that a case shall be appealable to the supreme court if the defendant has been convicted of a capital offense and a penalty of death actually has been imposed. This court reviewed defendant's *Batson* claims and concluded the trial court did not abuse its discretion or err in its denial of the claims. *State v. Snyder*, 98–1078, p. 11 (La.4/14/99), 750 So.2d 832, 842 (Snyder I). Thus, we conditionally affirmed defendant's conviction and sentence, but remanded the case to the trial court for a retrospective determination of defendant's [3]competency at the time of trial, if one could be made. *Id.*, 98–1078 at 43, 750 So.2d at 863.

Following our remand, the trial court held a bipartite hearing to determine whether a *nunc pro tunc* ruling could be made with respect to defendant's competency at the time of trial and whether defendant was competent to proceed with trial. The trial court ruled that a retrospective determination of defendant's competence was possible and that defendant was competent at the time of trial. Defendant appealed these rulings to this court.

* Retired Judge Fred C. Sexton, assigned as Associate Justice *Ad Hoc.*, sitting for Associate Justice Jeannette T. Knoll, recused.

1. The specific facts of the crime for which defendant was convicted are discussed in *State v. Snyder*, 98–1078 (La.4/14/99), 750 So.2d 832 (Snyder I).

2. The jury specifically found that defendant "knowingly created a risk of death or great bodily harm to more than one person." *Snyder*, 98–1078 at 3 n. 2, 750 So.2d at 837 n. 2. Snyder's estranged wife, Mary, was in a vehicle with Howard Wilson when defendant attacked both. Wilson died at the hospital, but Mary survived the attack and testified at trial. *Id.*, 98–1078 at 3, 750 So.2d at 836.

Upon finding the trial court complied with procedural due process requirements and the testimony and evidence supported the trial court's determination of competency, this court unconditionally affirmed the judgment of the trial court and sentence of death. *State v. Snyder*, 98–1078, p. 11 (La.4/14/04), 874 So.2d 739, 745 (*Snyder II*).

Subsequently, the Supreme Court of the United States granted defendant's petition for a writ of certiorari, vacated the judgment of this court, and remanded the case for further consideration in light of *Miller-El*, 545 U.S. 231, 125 S.Ct. 2317.[3] *Snyder v. Louisiana*, — U.S. —, 125 S.Ct. 2956, 162 L.Ed.2d 884 (2005).

LEGAL PRECEPTS

[1] The Equal Protection Clause of the United States Constitution prohibits engaging in purposeful discrimination on the grounds of race in the exercise of peremptory challenges. *Batson*, 476 U.S. at 89, 106 S.Ct. at 1719. The *Miller-El* decision that forms the basis for this remand was the third in a trilogy of Supreme Court opinions related to the allegedly discriminatory exercise of peremptory challenges in criminal trials. The trilogy presents a pendulous treatment by the Court of the issue of the evidentiary burden placed on a criminal defendant who claims that equal protection has been denied through the State's use of peremptory challenges to exclude individuals from the petit jury on the basis of race.

In *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), the Supreme Court recognized that a State's purposeful or deliberate denial of participation as jurors on account of race violates the Equal Protection Clause. Reviewing the "very old credentials" of the peremptory challenge system, the Court noted the "long and widely held belief that peremptory challenge is a necessary part of trial by jury." *Id.*, 380 U.S. at 219, 85 S.Ct. at 835. The majority of the Court sought to accommodate both the prosecutor's historical privilege of peremptory challenge free of judicial control and the constitutional prohibition on exclusion of persons from jury service on account of race. Because the State may not exercise its challenges in contravention of the Equal Protection Clause, the Court held it was impermissible for a prosecutor to use challenges to exclude African–Americans from the jury "for reasons wholly unrelated to the outcome of the particular case on trial" or to deny to them "the same right and opportunity to participate in the administration of justice enjoyed by the white population." *Id.*, 380 U.S. at 224, 85 S.Ct. at 838. Thus, proof by a defendant that members of his race were struck from his jury was insufficient; a defendant's burden was to show the circumstances under which prosecutors were responsible for striking minority jurors beyond the facts of a particular case. *Id.* 380 U.S. at 223–228, 85 S.Ct. at 838–840. Proof of repeated striking of African–Americans over a number of cases

3. This was the second *Miller-El* opinion rendered by the Supreme Court. In the first, *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003), the Court did not address the merits of petitioner's claim to federal habeas relief from a state court conviction for capital murder. The procedural posture of the case at that time was that the federal District Court had denied the petition and the federal Court of Appeals had denied a certificate of appealability (COA). The Supreme Court granted certiorari and reversed, finding that a COA should have issued. The Court found the District Court did not give full consideration to the substantial evidence petitioner put forth in support of a prima facie case; instead, it accepted without question the state court's evaluation of the demeanor of the prosecutors and jurors in petitioner's trial.

was necessary to establish a violation of the Equal Protection Clause.

Twenty-one years after *Swain*, the Court swung the pendulum in the opposite direction, finding that the evidentiary formulation of *Swain* was inconsistent with standards that had developed during those years for assessing a prima facie case under the Equal Protection Clause. In *Batson*, 476 U.S. at 92–93, 106 S.Ct. at 1721, the Court called the *Swain* requirement "a crippling burden of proof" that had made prosecutors' peremptory challenges "largely immune from constitutional scrutiny." The Court held that a defendant could establish a prima facie case of purposeful discrimination in the selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. Evidence of a pre-existing pattern of discrimination in previous cases was no longer required.

Another 19 years later, in *Miller-El*, the Supreme Court moved the pendulum back toward middle ground. Stating that although the move from *Swain* to *Batson* left a defendant free to challenge the prosecution without having to cast *Swain*'s "wide net," the Court noted the net should not have been consigned to history; *Batson*'s individualized focus had an inherent weakness of its own caused by its very emphasis on the particular reasons a prosecutor might give. "If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*." *Miller-El*, 545 U.S. at 240, 125 S.Ct. at 2325. Thus, the Court reiterated—this time in a habeas proceeding[4]—*Batson*'s explanation that a defendant may rely on "all relevant circumstances" to raise an inference of purposeful discrimination. *Id.*[5]

Nevertheless, the Court left the *Batson* test intact in *Miller-El* and reaffirmed that position in *Rice v. Collins*, 546 U.S. 333, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006). Louisiana law codifies the *Batson* ruling in LSA-C.Cr.P. art. 795(C), which provides:

> No peremptory challenge made by the state or the defendant shall be based solely upon the race of the juror. If an objection is made that the state or defense has excluded a juror solely on the basis of race, and a prima facie case supporting that objection is made by the

4. The defendant's habeas petition sought review pursuant to 28 U.S.C.A. § 2254, which was explained by the Court as follows:

> Where 28 U.S.C. § 2254 applies, [the Court's] habeas jurisprudence embodies [significant] deference. Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, § 2254(e)(1), and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding, § 2254(d)(2).

Miller-El, 537 U.S. at 340, 123 S.Ct. at 1041.

5. The concern expressed by the majority of the Supreme Court in *Swain*, 380 U.S. at 219, 85 S.Ct. at 825, for accommodating the prosecutor's historical privilege of peremptory challenge was eroding as early as *Batson*, 476 U.S. at 102–103, 106 S.Ct. at 1726, when Justice Marshall, concurring with the majority stated: "The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely." Currently, in *Miller-El*, 545 U.S. at 269–74, 125 S.Ct. at 2342–2344, Justice Breyer, in a concurrence, noted that peremptory challenges are increasingly anomalous in our judicial system. He wrote, "If used to express stereotypical judgments about race, gender, religion or national origin, peremptory challenges betray the jury's democratic origins and undermine its representative function." Justice Breyer concluded that Miller-El illustrated the necessity of reconsideration of the Batson test and the peremptory challenge system as a whole. *Id.*

objecting party, the court may demand a satisfactory racially neutral reason for the exercise of the challenge, unless the court is satisfied that such reason is apparent from the voir dire examination of the juror. Such demand and disclosure, if required by the court, shall be made outside of the hearing of any juror or prospective juror.

[2–6] The race-neutral explanation need not be persuasive or even plausible. *Collins*, — U.S. at —, 126 S.Ct. at 973–974, *quoting Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). It will be deemed race-neutral unless a discriminatory intent is inherent in the explanation. The ultimate burden of persuasion as to racial motivation rests with, and never shifts from, the opponent of the peremptory challenge. *State v. Tyler*, 97–0338, p. 3 (La.9/9/98), 723 So.2d 939, 942, *cert. denied*, 526 U.S. 1073, 119 S.Ct. 1472, 143 L.Ed.2d 556 (1999). The trial court's findings with regard to a *Batson* challenge are entitled to great deference on appeal. *Id.* at 4;[6] *see also, State v. Juniors*, 03–2425, p. 28 (La.6/29/05), 915 So.2d 291, 316. When a defendant voices a *Batson* objection to the State's exercise of a peremptory challenge, the finding of the absence of discriminatory intent depends upon whether the trial court finds the prosecutor's race-neutral explanations to be credible. "Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Miller-El v. Cockrell*, 537 U.S. 322, 339, 123 S.Ct. 1029, 1040, 154 L.Ed.2d 931 (2003).

The three-step *Batson* process which guides the courts' examination of peremptory challenges for constitutional infirmities has recently been described again by the Supreme Court as follows:

> A defendant's *Batson* challenge to a peremptory strike requires a three-step inquiry. First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race. Second, if the showing is made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question. Although the prosecutor must present a comprehensible reason, the second step of this process does not demand an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices. Third, the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. This final step involves evaluating the persuasiveness of the justification proffered by the prosecutor, but the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. [Internal quotations and citations omitted.]

Collins, — U.S. at —, 126 S.Ct. at 973–74.

The Court's decision in *Miller-El*, 545 U.S. 231, 125 S.Ct. 2317, a multifaceted and fact-bound opinion on the merits of defendant's claim to habeas relief, further

6. We note the standard of review in a federal habeas case is different from that on direct appeal. In the context of a direct review of a *Batson* issue, the trial court's decision on the ultimate question of discriminatory intent by the State is a finding of fact accorded great deference, which finding will not be overturned unless clearly erroneous. *Miller-El*, 537 U.S. at 340, 123 S.Ct. at 1041. "Deference is necessary because a reviewing court, which analyzes only the transcripts from *voir dire*, is not as well positioned as the trial court is to make credibility determinations." *Id.*, 537 U.S. at 339, 123 S.Ct. at 1041.

clarifies the analysis to be used in *Batson*'s third and final step.[7] Although the case is a federal habeas case, it nevertheless indicates the type of evidence to be considered and the appropriate scope of an evaluation of the prosecutor's reasons to be applied by the trial court at the time a *Batson* challenge is raised, which are later pertinent to direct review by the appellate courts.

The *Miller-El* opinion begins by recognizing *Batson*'s weakness is its "very emphasis on the particular reasons a prosecutor might give." *Miller-El*, 545 U.S. at 240, 125 S.Ct. at 2325. The Court continued, "Some stated reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand." *Id.* *Miller-El*, therefore, redirects attention to "*Batson*'s explanation that a defendant may rely on 'all relevant circumstances' to raise an inference of purposeful discrimination," *Id.*, and to the trial judge's duty under *Batson* "to assess the plausibility" of the prosecutor's proffered reason for striking a potential juror "in light of all *evidence* with a bearing on it." (Emphasis supplied.) *Id.*, 545 U.S. at 252, 125 S.Ct. at 2331.[8]

In stating that the trial court must evaluate the prosecutor's proffered reasons to determine whether they are pretextual for a discriminatory intent, the Court made it abundantly clear that while a prosecutor might have some difficulty explaining his strikes that are oftentimes based on instinct, he simply must attempt to put his feelings into words. A trial court cannot overrule the *Batson* challenge merely because the court itself can envisage a race-neutral reason that could explain the use of a peremptory challenge against that individual. In this regard, the Court plainly stated that when "illegitimate grounds" such as race are in issue, a prosecutor simply must state his reasons "as best he can and stand or fall on the plausibility of the reasons he gives." *Id.*, 545 U.S. at 252, 125 S.Ct. at 2332.[9]

7. The Court had previously noted that the defendant had been indicted for capital murder in Texas. *Miller-El*, 537 U.S. at 328, 123 S.Ct. at 1035. He pled not guilty and jury selection took place during five weeks in February and March of 1986. When *voir dire* concluded, defendant moved to strike the jury on grounds that the prosecution had violated the Equal Protection Clause of the Fourteenth Amendment by excluding African-Americans through the use of peremptory challenges. Defendant's trial occurred prior to the Court's decision in *Batson*, while *Swain* was controlling precedent. As that case required, defendant sought to show that the prosecution's conduct was part of a larger pattern of discrimination aimed at excluding African-Americans from jury service. In a pretrial hearing, defendant presented extensive evidence in support of his motion. *Id.*

The Texas district court denied the motion to strike the jury, and 12 days later the jury found defendant guilty. The trial court sentenced him to death. *Id.*

Defendant appealed to the Texas Court of Criminal Appeals. While that appeal was pending, on April 30, 1986, the Supreme Court decided *Batson*. The Texas Court of Criminal Appeals remanded the case for new findings in light of *Batson*, and a post-trial hearing was held in 1988, two years after the allegedly discriminatory *voir dire*. *Id.*, 537 U.S. at 328-329, 123 S.Ct. at 1035.

8. One of the arguments defendant's appellate counsel makes would take us outside the four corners of the appellate record for so-called proof "that race discrimination is routine in Jefferson Parish." We decline to address this "historic discrimination" issue as the details of counsel's argument are not evidence. We do not view *Miller-El*, a habeas proceeding in federal court, as license to consider matters that are dehors the record which is before us on direct appeal.

9. This requirement is arguably at odds with the Louisiana statutory provision that provides "the court *may* demand a satisfactory

After a detailed discussion of all the evidence presented in support of defendant's *Batson* challenge, the Court concluded that the totality of the evidence showed the trial court was unreasonable and erroneous in determining the prosecutor's strikes of two potential jurors were not racially motivated. The Court summarized the myriad pieces of evidence that together yielded its decision. The [10] Court found the existence of several disturbing factors that together indicated the prosecution's proffered race-neutral reasons were mere pretext for discriminatory intent: (1) the "bare statistics," which showed that out of 20 black members of the 108-person venire panel, only 1 served, *Id.*, 545 U.S. at 240, 125 S.Ct. at 2325; (2) a "comparative juror analysis," or a side-by-side comparison, of some African-American panelists who were struck and white panelists who were allowed to serve, *Id.*, 545 U.S. at 239–53, 125 S.Ct. at 2325–32; (3) the "broader patterns of practice" that occurred during jury selection, which included inexplicable jury shuffling [9] and disparate questioning of African-American and non-African-American panelists, *Id.*, 545 U.S. at 252–62, 125 S.Ct. at 2332–38; and (4) historical evidence that the particular District Attorney's office involved in the case had for decades followed a known, formal, and specific policy of systematically excluding African-Americans from juries, *Id.*, 545 U.S. at 262–66, 125 S.Ct. at 2338–39. The Court readily acknowledged that the significance of some of the evidence of discriminatory intent was "open to judgment calls," but reasoned that when the evidence was viewed cumulatively, it was "too powerful to conclude anything but discrimination." *Id.*, 545 U.S. at 265, 125 S.Ct. at 2339.

The *Miller-El* opinion does not dwell on the trial court's credibility determination in favor of the prosecution. However, the Court's next *Batson*-third-step case, *Collins*, illustrates the difficulties courts face in attempting to review a trial court's resolution of a *Batson* challenge. In that case, a *Batson* challenge was made [11] after the prosecution struck a young, African-American female panelist, and the challenge was rejected by the state courts and the federal district court. However, when defendant sought collateral habeas corpus relief in the federal courts, the Ninth Circuit Court of Appeals reversed on grounds that the trial court had acted unreasonably by crediting the prosecutor's race-neutral reasons for striking the juror. *Collins v. Rice*, 348 F.3d 1082 (9 Cir.2003), *amended and superseded by*, 365 F.3d 667 (9 Cir. 2004).

racially neutral reason for the exercise of the challenge, *unless the court is satisfied that such reason is apparent from the voir dire examination of the juror.*" (Emphasis supplied.) LSA-C.Cr.P. art. 795(C). In the instant case, the prosecutor volunteered race neutral reasons each time defense counsel made a *Batson* objection. Thus, it is unnecessary for us to address reconciliation of the Louisiana provision with the mandate of *Miller-El*. We do observe, however, that the Louisiana statute's grant to the trial court of broad discretion in ruling on a *Batson* objection in light of apparent reasons from the voir dire may have been interpreted by the trial court as alleviating any necessity for explanation by the court of its reasons for allowing the State's peremptory challenges.

10. Jury shuffling was explained in *Miller-El*. Texas law permits either side in a criminal case to shuffle the cards bearing panel member names to rearrange the order in which they are questioned. Members seated in the back may escape *voir dire*, for those not questioned by the end of each week are dismissed. The Court noted the prosecution had shuffled the cards when a predominate number of African-Americans were seated at the front of the panel. *Miller-El*, 545 U.S. at 252–55, 125 S.Ct. at 2332–2333.

The Supreme Court reversed, finding the Court of Appeals had "improperly substituted its evaluation of the record for that of the state trial court." *Collins*, —— U.S. at ——, 126 S.Ct. at 973. The Court found the record did not demonstrate that a reasonable factfinder must necessarily conclude the prosecutor lied about his reasons for striking the panelist. *Id.* at 975.

Thus, the most recent admonition by the Supreme Court on jury selection after *Batson* focuses, not on a reviewing court's stringent parsing of a prosecutor's race-neutral reasons to ferret out pretext masking discriminatory intent, but on the leeway a reviewing court must grant a trial court in its evaluation of the credibility of the prosecutor in the third step of the *Batson* analysis. One clear difference between *Collins* and *Miller-El* is that there was no evidence that issues of race pervaded the entire voir dire in *Collins*. Furthermore, there was nothing beyond the four corners of the *Collins* voir dire to cause the Court to question the sincerity of the prosecutor's challenges.

[7] Notwithstanding the differences and similarities of *Miller-El* and *Collins*, the focus of the *Batson* framework is "to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process." *Johnson v. California*, 545 U.S. 162, 172, 125 S.Ct. 2410, 2418, 162 L.Ed.2d 129 (2005) (Permissible inferences of discrimination were sufficient to establish a prima facie case of discrimination, which satisfied the first *Batson* step.) While *Miller-El* indicates the type and quantum of evidence to be considered at *Batson*'s third step, *Miller-El*, *Collins*, and *Johnson* add no new elements to the venerable *Batson* analysis. *See Murphy v. Dretke*, 416 F.3d 427, 439 (5 Cir.2005) ("The Court did not announce any new elements or criteria for determining a *Batson* claim, but rather simply made a final factual and evidentiary determination of that particular petitioner's *Batson* claim."); Amanda S. Hitchcock, *"Deference Does Not By Definition Preclude Relief": The Impact of Miller-El v. Dretke on Batson Review in North Carolina Capital Appeals*, 84 N.C. L.Rev. 1328, 1330 (2006). Consequently, while *Miller-El* requires a somewhat expanded review of defendant's *Batson* claims, we perform our review pursuant to the typical *Batson* framework and the Louisiana constitutional and statutory provisions.

APPLICATION OF PRINCIPLES

Miller-El and *Collins* necessarily shape this court's response to the Supreme Court's present remand order and our reconsideration of the *Batson* issue, but do not require a detailed reconsideration of the voir dire of the five African-American prospective jurors peremptorily struck by the State. As we stated in *Snyder I*, the State's use of five of its peremptory challenges to strike African-American prospective jurors who survived challenges for cause resulted in defendant's being tried by an all-white jury.[11] Now defendant reargues that the State's use of "close to half" of its peremptory strikes to "exclude an entire group comprising only fourteen percent of the qualified pool" is

11. As noted in defendant's brief on remand, the only African-American venire person not stricken by the State, Jacqueline Woods, was in the seventh panel, which was questioned to seat two alternate jurors after the twelve-member jury had already been selected. None of the alternates sat. We agree with defendant's appellate counsel that the selection of Woods does not defeat defendant's *Batson* claim. *See State v. Harris*, 01-0408 (La.6/21/02), 820 So.2d 471 (*Batson* error required new trial, despite presence of one African-American on the jury.)

compelling evidence that the State's strikes were made on the impermissible basis of race.

Considering this argument, this court's current task is eased by an initial winnowing out of some of the challenged jurors. Currently, defense counsel makes no argument with regard to Loretta Walker, almost certainly because the record offers ample affirmative support for the prosecutor's challenge.[12]

With respect to two other prospective jurors, Greg Scott and Thomas Hawkins, Jr., this court previously found that the defendant waived any *Batson* claim on appeal by failing to object when the prosecutor struck the jurors, although defense counsel noted their race for the record. More importantly, defense counsel did not ask the prosecutor to articulate his race-neutral reasons for excusing Greg Scott and Hawkins when the *Batson* challenge was posed after the State struck Elaine Scott from the third panel of prospective jurors. *Snyder*, 98-1078 at 7-8, 750 So.2d at 839-40.[13] There is nothing in *Miller-El* or *Collins* that casts doubt on the correctness of this portion of Snyder I.

[8] Despite defense counsel's reiteration of the argument concerning the remaining two potential jurors, we turn to our previous decision regarding these persons:

> Defense counsel did ... lodge the proper *Batson* objections to the State's use of peremptory challenges against potential jurors Jeffrey Brooks [and] Elaine Scott.... The State originally accepted Brooks as a juror, but later backstruck him. The prosecutor's reasons for striking Brooks were that he appeared "very nervous" throughout questioning and that he would be missing class, as a student teacher, if chosen to serve on the jury. The prosecutor stated, "He's a student teacher. My main concern is for that reason, that being that he might, to go home quickly, come back with guilty of a lesser verdict so there wouldn't be a penalty phase."[14] Defense counsel responded by stating:

12. Walker stated initially that she could not consider the death penalty under any circumstances. Upon further questioning, Walker conceded that she could consider capital punishment in the case of the murder of a child. As the prosecutor informed the trial court, this case did not involve the killing of a child, and he therefore excluded Walker peremptorily on the basis of her general opposition to the death penalty.

13. Because the State had accepted Jeffrey Brooks in the first panel of prospective jurors, the strikes exercised against Greg Scott in the second panel and Hawkins in the third panel did not reveal any pattern of exclusions which might have supported an objection on *Batson* grounds. However, the care with which defense counsel noted the race of the jurors for the record placed both the State and the trial judge on notice that a *Batson* challenge might be forthcoming. Defense counsel then made the challenge during the examination of the third panel of prospective jurors and at that point could have argued that the State should also have to defend its strikes against Scott and Hawkins because they formed part of a pattern that became apparent with the later strike of Elaine Scott. However, counsel did not argue for the inclusion of Greg Scott and Hawkins in his *Batson* challenge, thereby prompting this court's procedural default on appeal of this aspect of the State's jury selection.

This court further found that counsel's failure to expand the basis of the *Batson* objection did not constitute ineffective assistance because the State's exclusion of Scott and Hawkins did not directly and fundamentally impact the integrity of the fact-finding process at trial. *Snyder*, 98-1078 at 11-12, 750 So.2d at 842, *citing Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

14. Before the court allowed the State's exercise of a peremptory challenge of Brooks, the State explained further: "If this case goes to the jury on Friday and one of them gets back

His main problem yesterday was the fact that he didn't know if he would miss some teaching time as a student teacher. The clerk called the school and whoever it was and the Dean said that wouldn't be a problem. He was told that this would go through the weekend, and he expressed that that was his only concern, that he didn't have any other problems.

As far as him looking nervous, hell, everybody out here looks nervous. I'm nervous.

The court allowed the State to exercise a peremptory challenge on Brooks.

With respect to prospective juror Elaine Scott, the district attorney excused her, stating, "I observed she was very weak on her ability to consider the imposition of the death penalty. Her words, exactly—I wrote it down, that she thinks she could, and that's the reason for our challenge." However, when asked again by the prosecution if she could impose the death penalty, she responded, "I could." She also responded affirmatively when asked if she could listen to the evidence and consider whether to accept or reject the insanity defense and hold the defense to its burden of proof. Nevertheless, the trial court accepted the State's explanation as race neutral and excused Elaine Scott.

[illegible]....

The trial court entertained the State's race neutral reasons for the exclusions without making a finding as to whether defendant had made a prima facie showing of purposeful racial discrimination. A trial court's "demand that a prosecutor justify his use of peremptory strikes is tantamount to a finding that the defense has produced enough evidence to support an inference of discriminatory purpose." *State v. Green*, 94-0887, p. 25 (La.5/22/95), 655 So.2d 272, 288. Nevertheless, the issue of whether the defense established a prima facie case of discrimination is moot once the prosecutor has offered a race-neutral explanation for the peremptory challenge and the trial court has ruled on the ultimate question of intentional discrimination. *Id.* (applying *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991)). Nonetheless, any response will qualify as race neutral "unless a discriminatory intent is inherent in the prosecutor's explanation." *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991).

Here, the trial court did not find that defendant had established purposeful discrimination and overruled the *Batson* objections. These rulings appear correct. Although not required by the caselaw, the State's proffered reasons were plausible, supported by the record and race-neutral. [Citations omitted.] The prosecutor's reasons constituted "legitimate" grounds for the exercise of a peremptory strike. [Citation omitted.] None of the reasons articulated by the State are readily associated with the suspect class that is alleged to be the object of the State's discriminatory use of peremptory challenges. Defendant, the opponent of the strikes, offered no facts or circumstances supporting an inference that the State exercised its strikes in a racially discriminatory manner. Therefore, the defendant's proof, when weighed against the prosecutor's offered race-neutral reasons, was not sufficient to prove the existence of dis-

there and gets' smart and thinks that if they come back [with] guilty of second degree murder, they won't have to do a penalty phase. I guarantee that's a very real concern."

criminatory intent. *See State v. Green*, 94-0887 at p. 27, 655 So.2d at 289.

After carefully reviewing the entire record of voir dire, we find no abuse of discretion or error by the trial court in its denial of defendant's *Batson* claims. The trial court heard the prospective jurors and concluded there were reasonable bases for the challenges in question. The record does not show that the State employed a tactic of purposeful discrimination in its exercise of peremptory challenges. [Record references and footnote omitted.]

Snyder, 98-1078 at 9-11, 750 So.2d at 840-842.

[16]Contrary to defense counsel's argument on remand,[15] we do not read the Supreme Court's remand as a "rejection of the analysis performed" in *Snyder I* with regard to defendant's "claim that the prosecutor in his case was illegally removing African-American venire persons based on their race in violation of *Batson*." Although the Supreme Court vacated the judgment and ordered reconsideration in light of *Miller-El*, we view the remand as a mere expansion of our review, not a rejection of the analysis made solely on a careful review of "the entire record of the voir dire." *Snyder*, 98-1078 at 11, 750 So.2d at 842.

Nevertheless, we have conducted another review of the voir dire transcript and find nothing there to disparage the above quoted *Batson* analysis conducted by this court in *Snyder I*. Indeed, our review uncovered a factor favorable to the State's use of a peremptory challenge to backstrike Brooks that was not mentioned in *Snyder I*.

At the beginning of the voir dire, the trial court gave a brief explanation of the jury selection process. The court announced the eligibility requirements for jury service and then asked the members of the venire who had any basis for disqualification or a significant reason that would warrant excusal to approach the bench. Each venire member approached the bench individually and provided his or her reason for ineligibility or for excusal. Some persons were questioned further by the State or the defense as to their reasons, and then the court either excused them or denied their requests.

During this preliminary voir dire process, the State consistently inquired of a potential juror whether or not his or her particular problem would prevent [17]concentration on the evidence so as to impair the juror's decision-making task. For example, when speaking to potential juror Chauffe, a single-mother of a school-aged child who claimed transportation problems, the prosecutor asked: "If you got selected on this jury anyway, despite what you're telling us, do you think that you would be able to pay attention to the evidence in the case, and listen to the Judge, and be a good juror? Or do you feel you would be worrying too much and not be able to listen to the evidence?" When Chauffe answered the second question affirmatively, the court excused her. The prosecutor asked the same type of question of prospective jurors Pickett, Nguyen, Laws, Perkins, and Miller.

Later, when the State exercised a peremptory challenge to backstrike Brooks, the race-neutral reason given was the prosecutor's reservations about this student teacher's ability to consider the issues

15. Defendant's current counsel was not involved in his representation at any stage of the trial or direct appeal. The Capital Appeals Project undertook representation following the denial of rehearing by this court on June 25, 2004, and prepared and filed the Petition for Writ of *Certiorari* to the Supreme Court of the United States.

without being distracted by his concerns about school. This reason was consistent with the concern voiced in the questioning of other potential jurors during the pre-voir dire process mentioned above.

Further, acknowledging that the peremptory challenge of Brooks requires a more detailed discussion than the challenge of Scott, we note defense counsel's comparison of the State's challenge of Brooks with the State's acceptance of Yeager and Sandras,[16] both white males on the fifth panel.[17] Yeager expressed concern with jury service because he had a commitment to an event scheduled for Sunday that he had been an integral part of for many years. Sandras reported he taught at the University of New Orleans, had just begun the semester, and would have a problem with any "prolonged absence." We note that both of these men were employed and apparently already had established careers; Brooks, on the other hand, was attempting to complete his college courses in order to begin a career in teaching.

The fact that Brooks actually approached the bench on his own volition and raised his teaching obligations as a hardship excuse indicates he was truly concerned, more so than Sandras and Yeager. When Brooks approached the bench to raise a hardship concern at the beginning of the jury selection proceeding, Brooks stated to the court that "there is something I'm missing right now that will better me towards my teaching career." On the other hand, Sandras and Yeager merely responded to defense counsel questioning posed to their panel regarding any jurors' personal reasons or pre-existing obligations which would make it difficult to concentrate or serve on the jury. Thus, Brooks initiated the concern about the trial being a hardship, while Sandras and Yeager merely responded to questions.

Defense counsel also would have us dismiss the State's claim that Brooks appeared nervous because certain questions Brooks asked during voir dire did not indicate nervousness. However, the fact that Brooks was articulate during the voir dire may have contributed to the prosecutor's fear that he would get "smart" during jury deliberation and suggest a verdict lesser than the death penalty. *See* Footnote 14, *supra*. Additionally, nervousness cannot be shown from a cold transcript, which is why only the trial judge can evaluate the demeanor of the juror and why the judge's evaluation must be given much deference. In *Collins*, the Supreme Court found that the Ninth Circuit had been too aggressive in its review and in its ultimate ruling which reversed the trial court's *Batson* rulings. The Supreme Court concluded the Ninth Circuit had improperly substituted its evaluation of the record for that of the state trial court. *Collins*, — U.S. —, 126 S.Ct. at 973, 163 L.Ed.2d 824.

16. Defense counsel also argues the State's challenge of Brooks was inconsistent with the prosecutor's failure to question McMurray about her concerns over a court-reporting course at Franklin College that she was just starting. Although McMurray approached the bench during the pre-voir dire process, her chief articulated concern was someone to take care of her two-and-a-half year old daughter. The court did not excuse her prior to the questioning of the second half of the second panel of jurors. During the prosecutor's questioning of the panel about the insanity defense, McMurray's responses indicated such a strong reservation concerning that defense that the responses obviated the need for questioning her about her ability to concentrate despite her personal problems. Subsequently, there was a predictable defense challenge for cause of this prospective juror that was granted by the court.

17. By the time the fifth panel was called, the State had already backstruck Brooks.

There was no indication that race was the underlying reason for backstriking Brooks any more than race was a consideration in the prosecutor's questions to the other potential jurors. *See State v. Harris*, 01-0408, p. 8 (La.6/21/02), 820 So.2d 471, 476 (The comparison of the treatment of the potential jurors of different races has been utilized by this court in a measurement of the racially-neutral reason for the exercise of the prosecution's challenge.)

The final part of our analysis is based on a review of the record as a whole as instructed by the Supreme Court in *Miller-El*, 545 U.S. at 240, 125 S.Ct. at 2325, 2331 ("[A]ll relevant circumstances" and "all evidence with a bearing" on the *Batson* issue must be considered.) First, we consider the proceeding at which the issue of racial prejudice was raised prior to the beginning of voir dire.

At a July 29, 1996 hearing to determine whether the State would be permitted to introduce at trial evidence of five incidents of domestic violence allegedly committed by defendant against his estranged wife to show defendant's motive and intent, the State made reference to "another case that was on television everyday for the last couple of years ... where this very thing happened." [18] Thereafter, on August 16, 1996, defense counsel filed a motion *in limine* specifically requesting the State be precluded at trial from referring to or making comparisons with O.J. Simpson or his trial, as such references would serve no purpose other than to confuse and prejudice the jury. The prosecutor responded:

> I think [the defense motion is] premature.... I can assure the Court that I'm not going to get up in my opening voir dire and say [that] "we're here for the Jefferson Parish O.J. Simpson ... case." I have no intentions of doing that. I have no—perhaps in argument, I don't know.
>
> ....
>
> I have given the Court my word that I will not, at any time during the course of the taking of evidence or before the jury in this case, mention the O.J. Simpson case.... I just ask [the court] not to grant this motion.

After the hearing,[19] the trial court denied defendant's motion based on the prosecutor's representations.

18. This proceeding was a *Prieur* hearing at which defense counsel attempted to have the evidence excluded as being irrelevant. At the hearing, the State identified the five incidents that had been included in the *Prieur* notice: 1) In May of 1995, Snyder beat his wife with a baseball bat. 2) On March 11, at a club in Kenner, Snyder hit his wife's head into the window of his truck. 3) On June 11, 1995, Snyder pushed his wife's head through the sheetrock wall of their bedroom. 4) On June 18, 1995, at the home of the parents of Mary Snyder, Snyder accosted his wife as she slept, put his hand over her mouth, and stabbed her several times with a screwdriver. 5) On another occasion, in a telephone call, Snyder threatened his wife with more bodily harm. In context, the State's reference to the O.J. Simpson case was an illustration to the court of the relevance of such incidents. The trial court ruled evidence of all five of the incidents would be admissible at defendant's trial.

19. In its motion, defense counsel stated:

> Surveys conducted since the verdicts in the O.J. Simpson trial have shown consistently that a large majority of white Americans believe the not guilty verdicts were wrong; many indicate that the verdicts have undermined their faith in the entire jury system. To play upon these fears and prejudices to what will doubtless be an overwhelmingly—if not all—white jury deciding the case with admitted similarities is an appeal to racism at worst and vigilante justice at best, and as such is specifically precluded by Louisiana law.

Despite the allegations of the defense motion, neither side introduced evidence at the hearing on the motion. Thus, the trial court's

Voir dire began against this backdrop on August 27, 1996.

Next, we note that the State did, in fact, make an indirect reference to the O.J. Simpson case during its rebuttal argument at the penalty phase of the trial. Because the reference was made during rebuttal, the reference was preceded by the following argument of defense counsel:

> [S]ome of the mitigating circumstances that we believe we've been able to demonstrate to you ... [relate to] whether Mr. Snyder was under extreme emotional or mental influence at the time of this particular incident.... I really didn't have to do much to show facts that might suggest that, because the State, when they put on their case, ... the officer from Kenner ... said that when he found Allen Snyder a couple of hours or 12 hours or so after this incident, he was curled up in a fetal position. He was suicidal. He kept saying, "They're coming to get me. [2] They're coming to get me." ... [T]here's never been any indication that Mr. Snyder was somehow staging that particular incident in order to get himself a better situation or a better sentence or to help himself out in any way.
>
> The testimony of that officer was accurate and it was truthful. The other thing that he testified to was that that house was in shambles. The furniture was strewn all about. Furniture was put up ... doors were barricaded. The furniture was being used as a barricade.... I'll ask you if that is not suggestive of some sort of [mental] disturbance.

The portion of the State's rebuttal argument that the defendant now complains about was in direct response to the above quoted argument. Specifically, the prosecutor stated:

> It's been very clear, and this is the last thing I'm going to say about Allen Snyder, that the kind of person he is, as Mr. Olinde described him in his opening statement, he's egocentric, and he has shown no remorse. More than that, as he stabbed his wife 15 times, put her through what Dr. Harkness described as a near-death experience, as she lay there gushing blood, as Mary Snyder sat in that seat right there, he left her there. He left her there to die. And when Detective Labat took the statement from him 12 hours later, ... not a word at any time where you would have heard him, how's my wife? Is she okay? Not a word. Is that because he's depressed or because he's got a far deeper problem?
>
> Brief mention. Mr. Vasquez tried to describe this man as being the man who—And it was 12 hours later when he called the Kenner Police Department, huddled up, claiming that he was suicidal, barricaded himself in the house. That made me think of something. Made me think of another case, the most famous murder case in the last, in probably recorded history, that all of you all are aware of—[At this point in the rebuttal argument, defense counsel voiced an objection, and both counsel approached the bench. The prosecutor argued the reference to the O.J. Simpson case was fair based on the similarities between what Synder did and what Simpson did, specifically pretending to be suicidal. The trial court overruled the defense objection.]
>
> The most famous murder case ... happened in California very, very, very similar to this case. The perpetrator in that case claimed that he was going to

denial was based solely on the argument of counsel.

> kill himself as he drove in a Ford Bronco and kept the police off of him, and you know what, he got away with it. Ladies and Gentlemen, is it outside the realm of possibility that that's not what that man was thinking about when he called in and claimed that he was going to kill himself?

In brief to this court, defense counsel urges this court to consider that the prosecutors selected an all-white jury as a means of playing their "O.J. card, an argument that persuaded two members of the court, Justices Johnson and Lemmon, to dissent from the majority decision." *See Snyder*, 98–1078 at 3, 750 So.2d at 864 (Lemmon, J., concurring in part and dissenting in part) ("I find compelling the rhetorical question by defense counsel in oral argument before this court, asking whether the prosecutor would have ranted about O.J.'s getting away with it if he had not backstruck the only black juror toward the end of voir dire.")

However, other than suggesting inferences to be drawn from the bare facts of the prosecutor's remarks both prior to and subsequent to the voir dire, defense counsel points to no evidence in the record to substantiate defendant's claim of discriminatory use of the peremptory challenges. The inferences defense counsel suggests are no more compelling than other race neutral inferences to be drawn when one considers the prosecutor's remarks in context. The remark at the motion in limine referred to the fact that the Simpson trial involved alleged domestic violence; the remark during rebuttal referred to the fact that Simpson feigned suicidal intent. Neither remark referred to Simpson's or Snyder's race. Counsel's citations to authorities concerning the Simpson trial never were, and are not now, part of the record before this court for review.

Miller-El directs that we cumulate all relevant items tending to point to racial discrimination and view them together when considering whether the trial court's determination of the existence of discrimination is clearly erroneous. Nevertheless, *Miller-El* directs that this court examine the precise reasons given by the State for its strike of Scott and Brooks. This court cannot attempt to hypothesize another reason that the State may have had for its strikes. As stated by the Court, the State must "stand or fall on the plausibility of the reasons he gives." *Miller-El*, 545 U.S. at 252, 125 S.Ct. at 2332. Consequently, we find that when the entirety of the record of defendant's case is reviewed, the record shows that the prosecution's stated reasons for striking Scott and Brooks were not pretextual. A review of this record compels a conclusion that race did not play an impermissible role in the exercise of these strikes.

When we view the totality of the evidence discussed herein, as *Miller-El* directs, despite the lack of the trial court's active participation in voir dire and its failure to articulate particularized reasons for its determination that the State's proffered reasons were not pretextual, we find the trial court's decision to allow the strikes of Scott and Brooks was not clearly erroneous. Considering the evidence in the record before us, a contrary conclusion would be an improper substitution of this court's evaluation for that of the trial court similar to that struck down in *Collins*, —— U.S. ——, 126 S.Ct. at 973, 163 L.Ed.2d 824. The record before us simply does not demonstrate that a reasonable factfinder must necessarily conclude the prosecutor lied about his reasons for striking Scott or Brooks. Applying *Miller-El* and *Collins*, the prosecutor's demeanor was evaluated by the trial court which found no discriminatory intent. The explanations were rea-

sonable and the proffered rationale had some basis in accepted trial strategy.

We conclude defendant did not carry his ultimate burden of persuasion that the State exercised peremptory challenges in a purposefully discriminatory manner. We reiterate that Snyder's "proof, when weighed against the prosecutor's offered race-neutral reasons, was not sufficient to prove the existence of discriminatory intent." *Snyder*, 98-1078 at 11, 750 So.2d at 842.

Accordingly, we reinstate the following decree.

DECREE

In accordance with the above reasons assigned by this court, we unconditionally affirm the judgment of the trial court and the sentence of death. In the event this judgment becomes final on direct review when either: (1) the defendant fails to petition timely the United States Supreme Court for certiorari; or (2) that court denies his petition for certiorari; and either (a) the defendant, having filed for or and been denied certiorari, fails to petition the United States Supreme Court timely, under its prevailing rules, for rehearing of denial of certiorari; or (b) that court denies his petition for rehearing, the trial judge shall, upon receiving notice from this court under LSA-C.Cr.P. art. 923 of finality of direct appeal, and before signing the warrant of execution as provided by LSA-R.S. 15:567(B), immediately notify the Louisiana Indigent Defense Assistance Board and provide the Board with reasonable time in which: (1) to enroll counsel to represent the defendant in any state post-conviction proceedings, if appropriate, pursuant to its authority under LSAR.S. 15:149.1; and (2) to litigate expeditiously the claims raised in that original application, if filed in the state courts.

AFFIRMED.

KIMBALL, J., dissents and assigns reasons.

CALOGERO, C.J., dissents for reasons assigned by KIMBALL, J.

JOHNSON, J., dissents and assigns reasons.

KIMBALL, J. dissenting.

I believe that a review of the entirety of this record performed using the vigorous analysis directed by the *Miller-El* Court reveals the trial court erred in allowing the State to peremptorily challenge Mr. Brooks. Consequently, I dissent from the majority's conclusion that defendant did not prove the State exercised peremptory challenges in a purposefully discriminatory manner.

At the outset, the raw numbers characterizing the selection of defendant's jury must be noted as they were in *Miller-El*. The State used five of its peremptory challenges to strike 100 percent of the African-American prospective jurors who survived challenges for cause. This resulted in defendant being tried by an all-white jury. Defendant argues that the State's use of "close to half" of its peremptory strikes to "exclude an entire group comprising only fourteen percent of the qualified pool" is compelling evidence that the State's strikes were made on the impermissible basis of race. While the fact that prosecutors used their peremptory strikes to exclude 100 percent of the eligible African-American panelists does not prove intentional racial discrimination, *Miller-El* cautions that " '[h]appenstance is unlikely to produce this disparity.' " *Miller-El*, 545 U.S. at 241, 125 S.Ct. at 2325 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 342, 123 S.Ct. 1029, 1042, 154 L.Ed.2d 931 (2003)). *See also State v. Trotter*, 280 Kan. 800, 127 P.3d 972, 981 (2006) ("[T]he

trial court must avoid placing a determinative emphasis on any one factor. Although the trial court can objectively compare numbers or other facts, it must subjectively evaluate the credibility of the prosecutor as he or she explains the reasons for each challenged strike.").

As explained by the majority, voir dire began against a backdrop of the issues of race and prejudice when the State made reference to the O.J. Simpson case. Following defendant's protests, the prosecutor assured the court that he would not refer to O.J. Simpson during the voir dire and evidentiary portion of trial. However, these representations appear disingenuous because the prosecutor clearly referenced the O.J. Simpson case during its rebuttal argument at the penalty phase of the trial.

Considering this injection of racial issues, and the fact that the prejudicial arguments were made to an all-white jury, I believe it is only reasonable to conclude that Mr. Brooks was peremptorily challenged by the State on the basis of his race when the entirety of the facts is considered. This is especially true in light of the fact that the trial court did not articulate its reasons for overruling the *Batson* challenge. While one may infer that the trial court found the State's reasons credible, this court, on appellate review, is not privy to the reasons for this credibility determination. One simply cannot tell whether it was something in the demeanor of the prosecution or in the behavior or attitude of Mr. Brooks that caused the trial court to believe the State's race-neutral reasons were not pretextual. The backstrike of Mr. Brooks followed the *Batson*-challenged peremptory strike of Ms. Scott, which had excluded the third of four African-American panelists to be examined. The State's backstrike of Mr. Brooks then removed the only African-American juror the State had accepted for service. With these circumstances as a backdrop, which *Miller-El* teaches are clearly relevant to the *Batson* analysis, the State's exercise of a peremptory challenge is suspicious.

The suspicions raised by the circumstances surrounding the exercise of the backstrike are not eased when the voir dire of Mr. Brooks is considered alone or when it is considered along with that of other panelists. The prosecutor stated he struck Mr. Brooks because he "looked very nervous" and the prosecutor was concerned that Mr. Brooks would vote in a way to avoid a penalty phase in order to go home quickly and miss less student teacher observation. However, the record reveals that when the trial court informed Mr. Brooks at the bench that Dr. Tillman did not see a problem as long as he missed only one week, Mr. Brooks simply responded, "Okay." He did not voice any further concerns or ask any questions. When the defense pointed out that Mr. Brooks did not seem to have lingering concerns once the trial court related Dr. Tillman's response, the State did not retort or further explain this justification. Most importantly, the prosecutors did not ask one question of Mr. Brooks concerning his student teaching commitments or whether he had any lingering time-related anxieties not dispelled by the trial court's inquiries of Dr. Tillman when they subsequently questioned him. Had Mr. Brooks's concern about his student teaching commitments genuinely mattered to the State, it would seem to reason that the State would have questioned him about it to determine the extent of his concern. On this subject, the *Miller-El* Court quoted *Ex parte Travis*, 776 So.2d 874, 881 (Ala.2000) as follows: "The State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimina-

tion." *Miller-El*, 545 U.S. at 246, 125 S.Ct. at 2328.

It is possible the State had genuine concern about Mr. Brooks's state of mind despite his apparent acceptance of Dean Tillman's assurances to the trial court. *Collins*, — U.S. at —, 126 S.Ct. at 975 ("That the prosecutor claimed to hold such concerns despite Juror 16's *voir dire* averments does not establish that she offered a pretext."). However, there was no pre-strike foreshadowing of genuine State concern over the possibility of Mr. Brooks having time-schedule anxieties. No attempt was made by the State to verify its hypothesis and develop an objective basis for its strike. *See Miller-El*, 545 U.S. at 250, 125 S.Ct. at 2330–31 n. 8 ("[T]he failure to ask undermines the persuasiveness of the claimed concern."); *State v. Harris*, 01–0408 at p. 8, 820 So.2d at 476 ("[T]he fact that potential jurors are challenged on the basis of a claimed bias, without being questioned about such a bias, 'raises a strong inference that they were excluded on the basis of race alone.' ") (quoting *Williams v. State*, 548 So.2d 501, 507 (Ala.Cr.App.1988)).

The second justification the prosecutor gave for striking Mr. Brooks was that he "looked very nervous." Later, another prosecutor added that he was "very uncertain." Defense counsel immediately challenged the State's characterization of Mr. Brooks's demeanor, stating "[E]verybody out here looks nervous. I'm nervous." *Cf. State v. Hobley*, 98–2460, p. 21 (La.12/15/99), 752 So.2d 771, 784 ("Notably, trial counsel neither disputed the explanations of inattentiveness given by the prosecutor nor developed a record of evidence contradicting those explanations."). This can be taken to mean that, in defense counsel's view, Mr. Brooks looked no more nervous than any other panelist and was not unusually nervous-looking. The State did not respond to the challenge of its proffered reason by providing examples of Mr. Brooks's alleged nervousness, or by making a comparison of his alleged nervousness to the demeanor of other panelists that the State found acceptable. While it is true that the ultimate burden of persuasion on the *Batson* challenge remained with defendant, the State made no effort to demonstrate that its motivation for the strike was benign, or to develop a record of objective support for its characterization. This reason proffered by the State, the ensuing comment by defense counsel, and the State's lack of further justification highlight the difficulties faced by reviewing courts when the trial court does not state its firsthand observations for the record.

Without the independent assessment from the trial court verifying the accuracy of the State's generalized and conclusory characterization, the record contains no objective support for the State's demeanor-based justification. In fact, the record seems to indicate that Mr. Brooks was an engaged and voluble juror throughout voir dire examination. For example, Mr. Brooks asked defense counsel to explain the apparent contradiction between the presumption of innocence and the rule requiring a defendant to prove that he was legally insane at the time of the offense. With regard to another aspect of the presumption of innocence, a defendant's Fifth Amendment right to remain silent at trial, when defense counsel asked the panelists whether "anybody [can] think of a reason why a defendant might not testify," Mr. Brooks alone spoke up and volunteered that defendant "may say something to destroy his credibility by accident." Finally, when asked by defense counsel whether anyone on the panel had any experience with someone suffering from mental illness, Mr. Brooks explained, "I'm a future teacher, and I run into students who have

different problems, retardation, things like that." Answers and interactions such as these are not the kind that reasonably might be expected of someone who looked "very nervous" and "very uncertain." In the absence of the trial court's independent and particularized assessment of Mr. Brooks's demeanor, a reviewing court can only look to the record, which seems to indicate a lack of nervousness and uncertainty on the part of Mr. Brooks. Consequently, the State's proffered race-neutral reasons for striking Mr. Brooks are called into question.

16 The majority, relying on the Court's admonition in *Collins* that reviewing courts should not improperly substitute their evaluations of the record for that of the trial court, concludes that "nervousness cannot be shown from a cold transcript, which is why only the trial judge can evaluate the demeanor of the juror and why the judge's evaluation must be given much deference." At 496. In this case, however, the trial judge allowed the State's peremptory challenge of Mr. Brooks without any explanation whatsoever. In contrast, the trial court in *Collins* specifically stated:

> With regard to 016 [the panelist at issue], the court, frankly, did not observe the demeanor of Ms. 016 that was complained of by the District Attorney; however, Ms. 016 was a youthful person, as was [a white male juror the prosecutor also dismissed by peremptory challenge]. And one or more prospective jurors also. The [c]ourt is prepared to give the District Attorney the benefit of the doubt as to Ms. 016.

Rice v. Collins, 546 U.S. 333, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006). Thus, the trial judge in *Collins* made particularized findings regarding the prosecutor's proffered reasons. The trial judge in the instant case made no comment regarding Mr. Brooks's demeanor or his opinion of the trustworthiness of the prosecutor's explanations, even when the defendant immediately challenged the prosecutor's characterization of Mr. Brooks's demeanor. It is true that he allowed the peremptory challenge, but we are left with nothing but conjecture regarding his reasoning in the face of contrary characterizations of Mr. Brooks's demeanor by the State and the defendant. In my view, it is this lack of particularized reasons under these circumstances that distinguishes this case from *Collins*.

The credibility of the State's proffered reasons is called further into question when the strike of Mr. Brooks is compared with the State's treatment of panelists who 17 expressed similar concerns that could have caused them to vote in a way to shorten the trial if selected as a juror. After Mr. Brooks was excused, the fifth panel of prospective jurors included Michael David Sandras, a white teacher at University of New Orleans. In response to defense counsel questions related to whether any panelist had any personal reasons or pre-existing obligations that would make it difficult to serve on the jury or to concentrate during the trial, Mr. Sandras stated that the semester had just started the day before and that "any prolonged absence ... becomes a real problem." Mr. Sandras further conceded that he might have trouble concentrating on the trial "to some extent" because he was "responsible as far as the students, obviously, and I'd have to somehow pass on the information concerning work." The State did not attempt to explore Mr. Sandras's concerns by asking followup questions. Instead, the State accepted Mr. Sandras as a juror, who was then peremptorily challenged by the defense. That the defense peremptorily struck Mr. Sandras so that he did not serve on the jury is of no moment because the defense did not make

the decision to strike him until after the State made the decision to accept him. *See Miller-El*, 545 U.S. at 245, 125 S.Ct. at 2328 n. 4 ("The fact that Witt and other venire members discussed here were peremptorily struck by the defense is not relevant to our point. For each of them, the defense did not make a decision to exercise a peremptory until after the prosecution decided whether to accept or reject, so each was accepted by the prosecution before being ultimately struck by the defense. And the underlying question is not what the defense thought about these jurors but whether the State was concerned about [their] views ... when the venireperson was not black."). The State's complete lack of concern regarding Mr. Sandras's expressed worries about neglecting his teaching duties if he were selected to serve on the jury and its ultimate acceptance of him as a juror seem to indicate that its proffered reason for striking Mr. Brooks was pretextual and that it struck him because of his race.

Similarly, in response to the same questioning by defense counsel, Mr. Arthur Yeager, Jr., a white retired engineer, stated that he had "a longstanding commitment to an event that's going to take place on Sunday that I've been an integral part of for many years." Defense counsel informed Mr. Yeager that they should be finished by then. Mr. Yeager seemed to be appeased and stated he could make the necessary arrangements with a few telephone calls "and take care of my animals, too." The State asked no additional questions related to Mr. Yeager's concerns, and, along with the defense, accepted him as a juror.

In my view, the acknowledged time concerns of Mr. Sandras and Mr. Yaeger seem equally significant as the time concerns attributed to Mr. Brooks. The majority discounts the similarities among these potential jurors by pointing out that Mr. Brooks initiated the discussions regarding his concerns about missing his obligations, while Mr. Sandras and Mr. Yeager merely responded to questions. However, in no instance did the State question Mr. Sandras or Mr. Yeager about their admitted concern regarding the time they would spend in court, and away from their personal activities, if selected to serve on the jury. The State chose to strike only Mr. Brooks, in part because of his stated concerns about missing a portion of his student teaching duties. The similarities among Mr. Brooks, Mr. Sandras, and Mr. Yaeger, and the State's uneven treatment of these panelists does not make the State's proffered reasons for striking Mr. Brooks *per se* pretextual. Both Mr. Sandras and Mr. Yaeger may have exhibited legitimate traits and qualities that made the State believe they would make more desirable jurors than Mr. Brooks. *See Juniors*, 03-2425 at p. 31, 915 So.2d at 317-18; *State v. Collier*, 553 So.2d 815, 822 (La.1989). The factor that calls the State's strike of Mr. Brooks into question is the total lack of interest prosecutors exhibited in the admitted time concerns of Mr. Brooks, Mr. Sandras and Mr. Yaeger until it needed to justify with race-neutral reasons its strike of Mr. Brooks.

Miller-El directs that appellate courts cumulate all relevant items tending to point to purposeful discrimination and view them together when considering whether the trial court's determination of the existence of purposeful discrimination is clearly erroneous. The record shows that issues of racial prejudice existed at the outset of this case when defendant attempted to foreclose the possibility of the State mentioning the O.J. Simpson trial during his own trial. Defendant was tried by an all-white jury after the State used five of its peremptory strikes to chal-

lenge 100 percent of the eligible African-American panelists. In the absence of the trial court's independent and objective assessment on the record of Mr. Brooks's demeanor and attitude, the record tends to belie the prosecutor's stated race-neutral reasons for striking him. Rather than seeming uncertain and nervous, Mr. Brooks appears from a reading of the cold transcript to be engaged, forthcoming and communicative. Additionally, although the State offered the fact that Mr. Brooks might want to manipulate his deliberation to cut the trial short because of his stated concerns about missing his student teacher duties as a race-neutral reason for its strike, the State did not ask Mr. Brooks one question regarding this concern. Moreover, the State accepted without question on the issue at least two panelists who voiced similar concerns and might conceivably have the same motivation for cutting the trial short. Finally, we note that the State injected race into the proceedings directly when it did, in fact, mention the O.J. Simpson case during its penalty phase argument over the defendant's objection.

[10]When viewed in isolation, perhaps none of the factors above would constitute enough evidence to overturn the trial court's determination in light of the great deference afforded its factual determinations. However, the totality of the evidence discussed herein, combined with the lack of the trial court's active participation in voir dire and its failure to articulate particularized reasons for its determination that the State's proffered reasons were not pretextual, leads to the conclusion that the trial court's decision to allow the strike of Mr. Brooks was clearly erroneous. In my view, the cumulative evidence of pretext is compelling and too powerful to conclude anything but intentional racial discrimination motivated the State's strike of Mr. Brooks. Consequently, I would reverse defendant's conviction and sentence.

JOHNSON, Justice, dissenting and assigning reasons:

[11]When this case was first before this court on original review in *Snyder I*, 98-1078 (La.04/14/99);750 So.2d 832, I stated:

> I would have more confidence in the fairmindedness of this jury and the jury's pronouncement of the death sentence, had the state not used its peremptory challenges to exclude every African American juror, resulting in an all white jury for this black defendant. In my view, this violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), coupled with the prosecutor's inflammatory and prejudicial comparison of this case to the O.J. Simpson trial, require that we set aside the death sentence and remand the case for resentencing.

The Sixth Amendment to the United States Constitution gives a criminal defendant the right to a trial by a jury of his peers. I still believe that racial discrimination in the jury selection process offends the Equal Protection Clause of the Fourteenth Amendment and a pattern of strikes against African American jurors still gives rise to an inference of discrimination. Once the inference of discrimination is present, the prosecutor then has the burden of articulating a race-neutral explanation for striking the African American jurors. The trial judge serves as the gatekeeper, ensuring that racial prejudice, which impedes the securing of equal justice, does not invade our judicial system. As the gatekeeper, the trial judge must decide whether the prosecutor has articulated a genuine concern, or whether the reason articulated is merely a guise to accomplish his/her discriminatory purpose.

Verbalized facially neutral reasons can be a pretext for conscious or unconscious racism.

In the present case, the prosecutor's action in accepting the first African-American juror seems to have been a tactic to keep defense counsel from raising *Batson* challenges to the subsequent exclusions. [12]Nonetheless, defense counsel noted in the record which excluded jurors were African-American. The *Batson* challenges to the remaining three African-American jurors, including the one juror who was accepted and later backstruck, were overruled by the trial court. The trial court accepted the prosecutor's "race-neutral" explanations and the majority found them to be "plausible, supported by the record and race neutral."

The prosecutor's discriminatory intent in excluding all African-Americans from the jury was evidenced by his reference to the O.J. Simpson trial during closing arguments. In *State v. Green*, 94-0887 (La.5/22/95), 655 So.2d 272, 287, we recognized that "for a *Batson* challenge to succeed, it is not enough that a racially discriminatory result be evidenced; rather, that result 'must ultimately be traced to a racially discriminatory purpose.' " Here we have a racially discriminatory result. An all-white jury selected by peremptorily excluding the five African-Americans from the venire, and the prosecutor's racially discriminatory purpose of inflaming the jury by referring to O.J. Simpson getting away with murder in California.

Because of the nationwide media focus on O.J. Simpson, the defense made a pre-trial motion to exclude any references to the O.J. Simpson case. This motion was denied by the trial judge based on the prosecutor's assurance that he would not, at any time during the course of taking evidence or before the jury, mention the O.J. Simpson case. It is blatantly clear that the prosecutor did not intend to keep his word. The prosecutor had no need to make reference to this defendant not getting away with murder during the penalty phase of the trial. At this point, the defendant had already been convicted of the crime, so there was nothing for him to "get away with." The prosecutor utilized the O.J. Simpson verdict to racially inflame the jury's passion to sentence this defendant to death. Such tactics leave no doubt in my mind that the prosecutor had a racially discriminatory purpose for excluding the African-American jurors.

During the hearing on the pre-trial motion to exclude references to the O.J. Simpson case, the following colloquy occurred:

Prosecutor:

Now, certainly, I can assure the Court that I'm not going to get up in my opening voir dire and say, "we're here for the Jefferson Parish O.J. Simpson court-case." I have no intentions of doing that. I have no-perhaps in argument, I don't know. I don't know. It might be inappropriate, but I think it's premature. And I can assure this Court I will make no reference to the O.J. Simpson case at any time during the course of the taking of any evidence in this case.

Defense Attorney:

That's-Judge, evidence is not what I'm worried about. I'm certain he's not going to ask any witnesses, "don't you think this is a whole lot like the O.J. Simpson case?" I'm concerned about Mr. Williams' famous arguments.

[13] . . .

Defense Attorney:

And I would ask that the court issue a ruling that Mr. Williams is not to refer

to this or to make comparisons in any way with the O.J. Simpson case and that he be held in contempt if he does that.

Prosecutor:

Judge, I ask the court to allow me, as an officer of this Court, to conduct this case in the proper manner, but in the way that I see fit. And, I have given the Court my word that I will not, at any time during the course of the taking of evidence or before the jury in this case, mention the O.J. Simpson case.... So, I have-I give the Court my word that I won't do this. I just ask you not to grant this motion.

....

The Court:

Based on Mr. Williams' representations, I'm going to deny your motion.

The defense argues that the prosecutor's comments on the O.J. Simpson verdict to this all white jury were devastating and requires that the conviction be reversed. While there is much evidence that the majority of white Americans believed O.J. Simpson was guilty of murdering his wife and that he "got away with it," the prosecutor's improper comments during the penalty phase do not implicate the trial phase.

The defendant's own confession, plus the testimony of his ex-wife, Mary Snyder who survived this brutal attack, along with that of Gwen Williams, the witness who came to the aid of Ms. Snyder during the attack, support the defendant's conviction of first degree murder. The prosecutor's improper and clearly inflammatory comments did, however, create a substantial risk that the death penalty would be imposed. In my opinion, the defendant's death sentence should be set aside and this matter remanded for re-sentencing.

The United States Supreme Court granted defendant's writ of habeas corpus, vacated the judgment of this court and remanded the case to the Court to reconsider defendant's *Batson* claims in light of its recent opinion in *Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005). In *Miller-El*, the Supreme Court reaffirmed its position that racial discrimination by any state in jury selection offends the Equal Protection Clause of the 14th Amendment to the United States Constitution. This rule is meant to ferret out discrimination from our judicial system.

In this case, the majority's opinion concludes that although the prosecution is required by *Batson* to give race neutral reasons for a peremptory challenge, the race neutral reasons need not be *persuasive* or even *plausible*. The trial court need only find the prosecution's race neutral explanations to be *credible*. They conclude that the burden of proof never shifts from the defendant who must prove the State's discriminatory intent.

The difficulty for trial courts has always been separating out reasons that are legitimate, from those that are merely pretextual. *Miller-El* suggests some tools to use in determining whether the proffered race neutral reasons are pre-textual. First, we should look at the number. In *Miller-El*, out of twenty(20) black members included in the one-hundred and eight (108) person venire panel, only one (1)actually served as a juror. Here, nine (9) of the eighty-five (85) prospective jurors were black. Four(4) were dismissed for cause and five(5) were removed by the State with peremptory challenges. One of the two alternate jurors was black, but she did not participate in the jury's deliberations.

Secondly, *Miller-El* suggests we must do a side-by-side comparison of the black jurors who were struck and the white ju-

rors who were allowed to serve. Any patterns of disparate treatment or questioning with regard to the death penalty should lead to the conclusion that the questioning was intended to exclude black venire members, despite any race neutral reasons proffered to the contrary. The trial court's job is to determine whether the reasons are credible, or even plausible.

Next, *Miller-El* suggests that we go beyond the comparisons to look at broader patterns of discriminatory practices during the jury selection process. In *Miller-El*, the Court concluded that the first clue to the prosecutor's discriminatory intent could be found in their resort during voir dire to a procedure known in Texas as the "jury [1]shuffle." The record showed that the Dallas County District Attorney's Office used the jury shuffle to manipulate the racial composition of the jury and avoid reaching prospective black panel members.

Louisiana does not have the "jury shuffle," but we do have a practice that can be used in an equally discriminatory fashion. Louisiana allows parties to use peremptory challenges to "back strike" jurors pursuant to LSA–C.Cr.P. art 795.[1]

In *State v. Plaisance*, 00–1858 (La. App.4Cir.3/6/02), 811 So.2d 1172, *rehearing denied*, the Fourth Circuit concluded that the trial court's error in not allowing back strikes and the method employed in exercising challenges was harmless; the guilty verdict rendered was unattributable to the errors. In *State v. Watts*, 579 So.2d 931 (La.1991), the Court granted a writ of certiorari with an order stating: "A juror temporarily accepted and sworn in accordance with LSA–C.Cr.P. Art. 788 may nevertheless be challenged peremptorily prior to the swearing of the jury panel in accordance with LSA–C.Cr.P. Art. 790. LSA–C.Cr.P. Art. 795(B)(1)." *See also State v. Taylor*, 93–2201 (La.2/28/96), 669 So.2d 364, 376 ("peremptory challenges are exercisable at any time before the jury panel is sworn,") citing LSA–C.Cr.P. arts. 788, 790, 795(B)(1).

In this case, the State used its seventh peremptory challenge to back strike Jeffery Brooks, who had initially been accepted in the first panel of prospective jurors called for examination. Upon the defense's *Batson's* challenge to the State's later backstrike of Mr. Brooks, the State responded that Mr. Brooks was very uncertain, and "looked nervous to me throughout the questioning," and that Mr. Brooks's concern about missing class as a student teacher might lead him "to go home quickly, [2]come back with guilty of a lesser verdict so there would not be a penalty phase." The trial court allowed the peremptory challenges without a ruling as to whether the State's explanation was race-neutral or credible.

The *Batson* violations herein resulted in the defendant being denied his right to be tried by a jury of his peers. In *Snyder I*, I was of the opinion that these *Batson* violations required a setting aside of the death penalty, but not the conviction(guilt phase), since the evidence seemed to be persuasive. Now, I am of the opinion that these flagrant *Batson* violations require that the defendant's conviction and sentence must be set aside, and the case remanded for a new trial. The defendant in a capital case is entitled under the Sixth and Fourteenth Amendments to an impartial jury in both the guilt and the penalty phase. *Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222, 191 L.Ed.2d 492(1992).

1. Back striking refers to a party's exercise of a peremptory challenge to strike or excuse a prospective juror after initially accepting him, but prior to the final swearing of the jury panel.

For the aforementioned reasons, I respectfully, dissent.

1

2006-0097 (La. 10/17/06)

Sylvanus Gordon REESE & Lola Reese

v.

LIBERTY MUTUAL INSURANCE COMPANY.

No. 2006–C–0097.

Supreme Court of Louisiana.

Oct. 17, 2006.

On Writ of Certiorari to the Court of Appeal, First Circuit, Parish of St. Tammany.

John M. Robin, Covington, for Applicant.

Barrasso, Usdin, Kupperman, Freeman & Sarver, New Orleans, Meredith A. Cunningham, Judy Y. Barrasso, for Respondent.

PER CURIAM.

We granted plaintiffs' application for a writ of certiorari in this case on May 5, 2006. After hearing oral arguments on September 6, 2006 and reviewing the record of the matter, we conclude the judgment below does not require the exercise of this court's supervisory authority. Accordingly, we recall our order of May 5, 2006 as improvidently granted, and we deny plaintiffs' writ application.

2

2005-1594 (La. 10/17/06)

Yata JACKSON, Individually, Troy Jackson, Individually, and Yata Jackson and Troy Jackson on Behalf of their Minor son, Troy Williams, II

v.

TULANE MEDICAL CENTER HOSPITAL AND CLINIC and its Employees, and Dabney J. Hamner, Jr., M.D. and ABC Insurance Company.

No. 2005–C–1594.

Supreme Court of Louisiana.

Oct. 17, 2006.

Rehearing Denied Dec. 15, 2006.

Background: Parents brought medical malpractice action against hospital and obstetrics and gynecology resident, alleging that negligence in the performance of amniocentesis caused infant to be born with eye injury that rendered infant blind in one eye. The District Court, Parish of Orleans, entered judgment on jury verdict in favor of defendants. Parents appealed. The Court of Appeal reversed and rendered judgment for parents. Defendants filed petition for writ of certiorari.

Holding: The Supreme Court, Kimball, J., held that jury's finding that defendants did not breach the standard of care was not manifestly erroneous.

Judgment of the court of appeal reversed; judgment of the trial court reinstated.

Johnson and Weimer, JJ., dissented and assigned reasons.

Calogero, P.J., and Johnson and Weimer, JJ., would grant a rehearing.

1. Appeal and Error ⇐999(1)

Under the manifest error standard of review, a factual finding cannot be set

APPENDIX B

Supreme Court
STATE OF LOUISIANA
New Orleans

PASCAL F. CALOGERO, JR.
CHIEF JUSTICE

JOHN TARLTON OLIVIER
CLERK OF COURT

400 ROYAL STREET
NEW ORLEANS, LA 70130

TELEPHONE (504) 310-2300
HOME PAGE http://www.lasc.org

December 15, 2006

Jelpi Pierre Picou, Jr. Esq.
636 Baronne Street
New Orleans, LA 70113

In Re: State of Louisiana
Vs.
Allen Snyder
No. 1998-KA-1078

Dear Counsel:

Enclosed please find a News Release documenting this court's denial of the application for rehearing, in the above entitled referenced case.

With kindest regards, I remain,

Very truly yours,

John Tarlton Olivier
Clerk of Court
Katherine A. Fontana
By: Katherine A. Fontana
Deputy Clerk of Court

KAF/jdh
Enclosure
cc: Hon. Paul D. Connick, Jr.
Hon. Kernan A. Hand
Marcia Adele Widder, Esq.
Aneel Lachman Chablani, Esq.
Alfred Adolphe Olinde, Jr., Esq.
Hon. Jon Gegenheimer
Terry Michael Boudreaux, Esq.
Hon. Charles C. Foti, Jr.
James Alan Williams, Esq.

Supreme Court of Louisiana

FOR IMMEDIATE NEWS RELEASE — NEWS RELEASE # 071

FROM: CLERK OF THE SUPREME COURT OF LOUISIANA

On the 15th day of December, 2006, the following action was taken by the Supreme Court of Louisiana in the cases listed below:

APPLICATIONS FOR REHEARING NOT CONSIDERED:

2006-C -0097 — SYLVANUS GORDON REESE & LOLA REESE v. LIBERTY MUTUAL INSURANCE COMPANY (Parish of St. Tammany)
See Supreme Court Rule IX, § 6.

2006-B -0727 — IN RE: MACK I. FRANK
Not considered; not timely filed. Judgment is definitive. La. Code Civ. P. Art. 2167; Supreme Court Rule XIX, § 26 (E).

REHEARINGS DENIED:

1998-KA-1078 — STATE OF LOUISIANA v. ALLEN SNYDER (Parish of Jefferson)
CALOGERO, C.J., would grant a rehearing.
KIMBALL, J., would grant a rehearing.
JOHNSON, J., would grant a rehearing.

2005-C -0470 — WAYNE COSBY, KARI FITZGERALD, JOHN FITZGERALD, STAN MCDONALD, KEITH STEVENS, KAREN WILLIAMS, CARL WILLIAMS, AND PETER OELSCHLAEGER v. HOLCOMB TRUCKING, INC., HENRY H. HOLCOMB, AND JOYCE H. HOLCOMB (Parish of Livingston)
KNOLL, J., would grant a rehearing.

2005-C -1594 — YATA JACKSON, INDIVIDUALLY, TROY JACKSON, INDIVIDUALLY, AND YATA JACKSON AND TROY JACKSON ON BEHALF OF THEIR MINOR SON, TROY WILLIAMS, II v. TULANE MEDICAL CENTER HOSPITAL AND CLINIC AND ITS EMPLOYEES, AND DABNEY J. KAMNER, JR., M.D. AND ABC INSURANCE COMPANY (Parish of Orleans)
CALOGERO, C.J., would grant a rehearing.
JOHNSON, J., would grant a rehearing.
WEIMER, J., would grant a rehearing.

2005-C -2274 — DENHAM SPRINGS ECONOMIC DEVELOPMENT DISTRICT v. ALL TAXPAYERS, PROPERTY OWNERS AND CITIZENS OF THE DENHAM SPRINGS ECONOMIC DEVELOPMENT DISTRICT, AND NONRESIDENTS OWNING PROPERTY OR SUBJECT TO TAXATION THEREIN, AND ALL OTHER PERSONS INTERESTED IN OR AFFECTED IN ANY WAY BY THE ISSUANCE OF NOT TO EXCEED $50,000,000 DENHAM SPRINGS ECONOMIC DEVELOPMENT DISTRICT SALES TAX INCREMENT BONDS (BASS PRO SHOPS PROJECT) IN ONE OR MORE SERIES, THE MEANS PROVIDED FOR THE PAYMENT AND SECURITY THEREOF AND RELATED MATTERS (Parish of Livingston)

APPENDIX C

98-1078 (La. 4/14/99)

STATE of Louisiana

v.

Allen SNYDER.

No. 98-KA-1078.

Supreme Court of Louisiana.

April 14, 1999.

Defendant was convicted in the Twenty-Fourth Judicial District Court, Parish of Jefferson, No. 98-KA-1078, Kernan A. Hand, J., of first-degree murder and was sentenced to death. Defendant appealed. The Supreme Court, Kimball, J., held that: (1) trial court had duty to investigate competency to stand trial; (2) failure to investigate claims of incompetency required remand for determination of the possibility of a nunc pro tunc hearing on competency; (3) evidence supported conviction; (4) prosecutor gave race-neutral reasons for peremptory challenges; (5) photographs of non-fatal wound to murder victim's face were admissible; (6) any error in admitting ten-year-old photographs of defendant holding knife in martial arts poses was harmless; (7) reversal was not required by prosecutor's closing argument that case was similar to famous murder case against O.J. Simpson; and (8) attorneys has sufficient time to prepare.

Conditionally affirmed, and case remanded.

Lemmon, J., concurred in part, dissented in part, and assigned reasons.

Victory, J., concurred in part, dissented in part, and assigned reasons joined by Traylor, J.

Johnson, J., dissented and assigned reasons.

1. Homicide ⇐39

"Sudden passion" and "heat of blood" are not elements of manslaughter; rather, they are mitigatory factors in the nature of a defense and exhibit a degree of culpability less than that present when the homicide is committed in the absence of these factors. LSA-R.S. 14:31, subd. A(1).

2. Homicide ⇐239

A defendant who establishes by a preponderance of the evidence that he killed in "sudden passion" or "heat of blood" is entitled to a verdict of manslaughter in a murder prosecution. LSA-R.S. 14:31, subd. A(1).

3. Homicide ⇐253(3)

Evidence established first-degree murder, rather than manslaughter, when defendant repeatedly stabbed victim in car with defendant's wife, even though jury was aware of the defendant's marital difficulties, wife's extramarital affair with victim, and plan to discuss reconciliation; defendant's conflicting statements undercut manslaughter theory, and defendant's own confession and the testimony of two witnesses demonstrated that defendant waited and watched the victim and his wife. LSA-R.S. 14:30, subd. A(3), 14:31, subd. A(1).

4. Homicide ⇐253(6)

Sufficient evidence to support conviction for first-degree murder based on specific intent to kill or inflict great bodily harm upon more than one person supports aggravating circumstance that defendant knowingly created a risk of death or great bodily harm to more than one person. LSA-R.S. 14:30, subd. A(3); LSA-C.Cr.P. art. 905.4, subd. A(4).

5. Criminal Law ⇐1035(5)

Defendant waived any claim based upon the prosecutor's use of peremptory challenges against African-American prospective jurors, where he never requested race-neutral explanation. LSA-C.Cr.P. art. 841.

6. Constitutional Law ⇐221(4)
Jury ⇐33(5.15)

Perceived desire of student teacher to avoid penalty phase by voting for non-capital offense and two jurors' statements and beliefs about the death penalty were race-neutral reasons for peremptory challenges against African-American prospective jurors; thus, the challenges did not violate equal protection clause. U.S.C.A. Const.Amend. 14.

7. Jury ⇐33(5.15)

The issue of whether the defense established a prima facie case of discrimination is moot once the prosecutor has offered a race-neutral explanation for the peremptory challenge and the trial court has ruled on the ultimate question of intentional discrimination.

8. Jury ⇐33(5.15)

Any response by prosecutor will qualify as race neutral reason for exercising peremptory challenge unless a discriminatory intent is inherent in the prosecutor's explanation. U.S.C.A. Const.Amend. 14.

9. Criminal Law ⇐641.13(2.1)

Attorney did not prejudice defendant and, therefore, did not render ineffective assistance by failing to object to peremptory challenges to exclude African Americans; the Batson rule applying the equal protection clause did not have a fundamental impact on the integrity of factfinding. U.S.C.A. Const.Amends. 6, 14.

10. Criminal Law ⇐1162

Violating a rule that does not have a fundamental impact on the integrity of factfinding does not render the trial unfair and the verdict suspect.

11. Criminal Law ⇐661

The State is entitled to the moral force of its evidence.

12. Criminal Law ⇐438(6)

Postmortem photographs of murder victims are admissible to prove corpus delicti and to corroborate other evidence establishing cause of death and location and placement of wounds, as well as to provide positive identification of the victim.

13. Criminal Law ⇐438(7)

Photographic evidence will be admitted unless it is so gruesome that it overwhelms the jurors' reason and leads them to convict defendant without sufficient other evidence, i.e., when the prejudicial effect of the photographs substantially outweighs their probative value. LSA–C.E. art. 403.

14. Criminal Law ⇐438(7)

Probative value of graphic photographs of non-fatal wound to murder victim's face outweighed any prejudicial effect in capital murder prosecution; the photos illustrated the number and location of stab wounds and supported inference of specific intent to kill or to inflict great bodily harm. LSA–C.E. art. 403.

15. Criminal Law ⇐1169.1(10)

Any error in admitting ten-year-old photographs of defendant holding knife in martial arts poses was harmless at the guilt phase of capital murder prosecution; eyewitness and defendant's estranged spouse described defendant's brutal stabbing of victim and spouse, and defendant confessed.

16. Homicide ⇐343

Any error in admitting ten-year-old photographs of defendant holding knife in martial arts poses was harmless at the penalty phase of a capital murder prosecution; eyewitness and defendant's estranged spouse described defendant's brutal stabbing of victim and spouse, defendant confessed, and evidence indicated that he had hit his wife with a baseball bat, threatened to hit her with a hammer, slammed her head into a bedroom wall, smashed her head against a windshield, and stabbed her with a screwdriver.

17. Criminal Law ⇐1177

An error committed in the penalty phase of a capital case is harmless if the sentence is surely unattributable to the error.

18. Criminal Law ⇐723(1)

Prosecutor's closing argument that capital murder case against African-American defendant was similar to famous murder case against O.J. Simpson and that defendant was not really suicidal did not require reversal in penalty phase.

19. Criminal Law ⇐713

A prosecutor retains considerable latitude when making closing arguments. LSA–C.Cr.P. art. 774.

20. Criminal Law ⇐1171.1(2.1)

A conviction or sentence will not be reversed for improper closing argument unless appellate court is thoroughly convinced the remarks influenced the jury and contributed to the verdict.

21. Criminal Law ⇐589(1)

Whether a refusal to grant a continuance was justified depends on the circumstances of the particular case presented. LSA–C.Cr.P. art. 712.

22. Criminal Law ⇐1166(7)

Generally, Supreme Court declines to reverse convictions for improper denial of a motion to continue absent a showing of specific prejudice. LSA–C.Cr.P. art. 712.

23. Criminal Law ⇐578

Limits on the court's discretion to grant or deny a continuance are imposed by defendant's constitutional rights, including his rights to understand the proceedings against him, to assist in his defense, and to receive the assistance of counsel. U.S.C.A. Const.Amend. 6; LSA–C.Cr.P. art. 712.

24. Constitutional Law ⇐268.2(2)

Due process permits the trial of an accused only when he is legally competent. U.S.C.A. Const.Amend. 14.

25. Constitutional Law ⇐268.2(2)

The due process test for determining defendant's mental competency to stand trial depends upon whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him. U.S.C.A. Const.Amend. 14.

26. Criminal Law ⇐625.10(2.1)

Defense attorney's statement that she was experiencing difficulty communicating with defendant and medical evidence that defendant needed approximately six weeks to receive maximum benefit from new antidepressant medication obligated court to investigate competency to stand trial, even though attorney apparently conceded competency and psychiatrist and psychologist believed that defendant was able to understand proceedings against him. U.S.C.A. Const.Amend. 14.

27. Criminal Law ⇐625.10(3)

If there is a sufficient doubt as to the mental competency of an accused to stand trial, the trial court has a responsibility to order a hearing sua sponte. U.S.C.A. Const.Amend. 14.

28. Constitutional Law ⇐268.2(2)

Due process right to adequate procedures for preventing trial while incompetent is violated when, in light of facts known to the trial court, the failure to make further inquiry into defendant's competence denies him a fair trial; the relevant question is whether the trial judge received information which, objectively considered, should reasonably have raised a doubt about competency and alerted the judge to the possibility that the defendant could not understand the proceedings, appreciate their significance, or rationally aid his attorney. U.S.C.A. Const.Amend. 14.

29. Constitutional Law ⇐268.2(2)

The due process right not to stand trial while incompetent is sufficiently important to merit protection even if the defendant has failed to make a timely request for a competency determination. U.S.C.A. Const.Amend. 14; LSA–C.Cr.P. art. 642.

30. Mental Health ⇐432

The facts to consider in determining a defendant's ability to assist in his defense

include possible deterioration of mental condition under the stress of trial and defendant's ability to recall and relate facts pertaining to his actions and whereabouts at certain times, assist counsel in locating and examining relevant witnesses, maintain a consistent defense, listen to the testimony of witnesses and inform his lawyer of any distortions or misstatements, make simple decisions in response to well-explained alternatives, and testify in his own defense. U.S.C.A. Const.Amend. 14.

31. Criminal Law ⇐1181.5(4)

Trial court's erroneous failure to investigate defendant's claims of incompetency to stand trial required remand for determination of the possibility of a nunc pro tunc hearing to determine competency at trial, required such a hearing, if a meaningful inquiry into defendant's competency was still possible, and entitled defendant to new trial if defendant was incompetent or meaningful inquiry was impossible.

32. Criminal Law ⇐1166(7)

The denial of a motion for continuance on grounds of counsel's lack of preparedness does not warrant reversal unless counsel demonstrates specific prejudice resulting from the denial or the preparation time is so minimal as to call into question the basic fairness of the proceeding.

33. Homicide ⇐343

Four weeks to prepare for the penalty phase of capital murder prosecution was not so unreasonably short as to call into question the basic fairness of the proceeding; thus, defense counsel was required to demonstrate specific prejudice resulting from the denial motion for continuance.

34. Criminal Law ⇐1166(7)

Four months was sufficient time to prepare for guilt phase of capital murder prosecution; thus, counsel was required to show specific prejudice resulting from the denial motion for continuance.

35. Criminal Law ⇐998(8)

A claim of ineffective assistance of counsel is generally raised in an application for post-conviction relief. U.S.C.A. Const.Amend. 6.

36. Criminal Law ⇐598(2)

A subpoena is generally necessary to show "due diligence" within the meaning of article which requires a motion for a continuance based upon the absence of a witness to state facts showing due diligence. LSA-C.Cr.P. art. 709.

See publication Words and Phrases for other judicial constructions and definitions.

37. Criminal Law ⇐935(1)

A motion for new trial presents only the issue of the weight of the evidence. LSA-C.Cr.P. art. 851.

38. Homicide ⇐357(7)

Death sentence based on aggravating circumstance of risking death or great bodily harm to more than one person would not be disproportionate for 37-year-old defendant who injured estranged wife and fatally stabbed her companion. LSA-Const. Art. 1, § 20; LSA-C.Cr.P. arts. 905.4, subd. A(4), 905.9; LSA-Sup.Ct. Rules, Rule 28, 8 LSA-R.S.

39. Criminal Law ⇐1208.1(6)

If the jury's recommendation of death is inconsistent with sentences imposed in similar cases in the same jurisdiction, an inference of arbitrariness arises. LSA-C.Cr.P. art. 905.9; LSA-Sup.Ct.Rules, Rule 28, 8 LSA-R.S.

Marion B. Farmer, Covington, Counsel for Applicant.

Richard P. Ieyoub, Attorney General, Paul D. Connick, Jr., District Attorney, James Alan Williams, Alfred Adolphe Olinde, Jr., Counsel for Respondent.

KIMBALL, Justice. *

On August 29, 1996, a jury convicted defendant, Allen Snyder, of the first degree murder of Howard Wilson. One day later, after the penalty phase hearing, the

* CALOGERO, C.J., not on panel. See Rule IV, Part 2, Section 3.

jury unanimously determined that defendant should receive the death penalty. Defendant was subsequently sentenced to death by the trial judge in accordance with the jury's determination. Pursuant to La. Const. Art. 5, § 5(D), defendant appeals his conviction and sentence, arguing five assignments of error.[1] Because we find error in the trial court's failure to investigate defendant's request for a continuance based upon a claim of incompetence caused by his alleged inability to assist his counsel due to a change in his medication that left him mentally unstable at the time of trial, we remand this case to the trial court for a hearing to determine whether a retrospective determination of defendant's competence is still possible. If such a determination is, in fact, possible, the trial court shall hold a hearing to determine whether defendant was competent at the time of trial. If the trial court finds that defendant was competent, no new trial is required as we find none of defendant's other assignments of error have merit and therefore conditionally affirm his conviction and sentence. If the trial court finds that a retrospective determination of defendant's competence cannot be had, or, if after hearing evidence, determines that defendant was not competent at the time of trial, defendant shall be entitled to a new trial.

FACTS

Defendant, Allen Snyder, and his wife, Mary Snyder, were having marital difficulties in the summer of 1995. Towards the end of their relationship, neither partner remained entirely faithful to the other. After several incidents of physical abuse at the hands of her husband, Mary Snyder took their children and went to live with her mother. Despite this separation, defendant contacted Mary one evening in mid-August and the two discussed the possibility of getting back together. Mary agreed to meet defendant the following day to discuss a reconciliation. Defendant was anxious to meet with Mary and wanted to see her that evening, but she put him off, telling him she "didn't want to see him" that night. Rec. vol. 6, p. 1267.

Instead, Mary went out on a late night date with Howard Wilson, a married man she claimed she had recently met. Defendant repeatedly tried to page her during the evening, but Mary refused to respond. At the end of their date, at approximately 1:30 a.m. on August 16, 1995, Howard Wilson pulled his vehicle up to the home of Mary's mother to drop Mary off. Defendant walked up to the car, opened the driver's side door of the vehicle, and attacked both Howard Wilson and Mary Snyder with some sort of knife containing a double-edged blade. He inflicted nine wounds upon Howard Wilson and nineteen wounds upon Mary Snyder.

Gwen Williams witnessed the assault. She testified that she observed defendant stooped down beside a trailer that was across the street from the home of Mary's mother. She then saw defendant run from the trailer to Wilson's car, open the car door, jump into the car and attack Howard Wilson and Mary Snyder. Williams screamed at defendant which caused him to run away. Williams then helped Mary to her mother's house and the police were called. Howard Wilson died at East Jefferson Hospital. Mary Snyder survived the attack and testified at trial.

Approximately twelve hours later, defendant called the police claiming he was suicidal. The police went to his house to investigate, initially unaware of the fact that he was a murder suspect, and found defendant barricaded in his house and curled into a fetal position on the floor. Police officers then took defendant to the Criminal Investigations Bureau and, after advising him of his rights, took a statement from defendant. In his statement, defendant claimed he went to Mary's mother's house "to see where she was and who she was with." Transcribed Audio

1. Because each of defendant's five assignments of error was briefed and argued, this opinion contains no unpublished appendix.

Tape Statement, p. 3. He stated he brought a knife to "scare her, make 'em talk to me." *Id.* He told police that he approached the car not knowing whether Mary was inside the car or not. He opened the car door with the knife in hand and, according to his statement, told Howard Wilson they needed to talk. A scuffle then ensued. Defendant told police he was "out of control" at that time. *Id.* at 5. After the attack, defendant ran off, throwing the knife down somewhere along the way.

The state subsequently charged Allen Snyder with one count of first degree murder. After the trial, which began on August 27, 1996, a jury found defendant guilty as charged. After finding the presence of one aggravating circumstance,[2] the same jury unanimously determined defendant should receive the death penalty. A sentence of death was subsequently imposed by the trial court.

LAW AND DISCUSSION

Assignment of Error No. 1

In his first assignment of error, defendant argues that the evidence presented at trial did not support a conviction for first degree murder, but rather one for manslaughter. This claim is based upon the contention that defendant came upon the victim and Mary Snyder when they were engaged in a sexual act in the victim's car which was parked outside the home of Mary's mother.[3] Defendant maintains that when he saw his wife involved in sexual relations with another man, he was provoked to the point of losing his self-control and cool reflection.[4]

[1, 2] Manslaughter is a homicide which would be either first or second degree murder, but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. La. R.S. 14:31(A)(1).[5] It is the presence of "sudden passion" and "heat of blood" that distinguishes manslaughter from murder. This court has repeatedly stated, however, that "sudden passion" and "heat of blood" are not elements of the offense of manslaughter. Rather, they are mitigatory factors in the nature of a defense which exhibit a degree of culpability less than that present when the homicide is committed in the

2. Specifically, the jury found that:

> The offender knowingly created a risk of death or great bodily harm to more than one person.

Rec. vol. 1, p. 196.

3. No evidence of sexual activity between Mary Snyder and Howard Wilson was presented in the guilt phase of defendant's trial. In the penalty phase, however, two state experts testified that defendant told them that when he opened the car door, he saw his wife performing a sexual act with the victim. Rec. vol. 7, pp. 1534, 1546.

4. The defense claims that defendant came upon Mary Snyder and Howard Wilson while they were engaged in a sexual act in Wilson's car. Appellate counsel argues that had this information been fully investigated and presented to the jury, the mitigatory factors of provocation sufficient to deprive an average person of his self-control and cool reflection would have been proved by a preponderance of the evidence. However, no such evidence was presented by the defense in the guilt phase of defendant's trial. Counsel also argues in this assignment of error that the trial court erred in denying defendant a continuance which would have allowed defense counsel time to investigate this aspect of a manslaughter defense and would have allowed defendant time to stabilize on new anti-depressant medication. This argument is treated in our discussion of defendant's assignments of errors dealing with the trial court's failure to grant a continuance.

5. La. R.S. 14:31(A)(1) defines manslaughter as:

> A homicide which would be murder under either Article 30 (first degree murder) or Article 30.1 (second degree murder), but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that an average person's blood would have cooled, at the time the offense was committed;

absence of these factors. *State v. Lombard*, 486 So.2d 106 (La.1986); *State v. Tompkins*, 403 So.2d 644 (La.1981). Because they are mitigatory factors, a defendant who establishes by a preponderance of the evidence that he acted in "sudden passion" or "heat of blood" is entitled to a verdict of manslaughter. *Lombard*, 486 So.2d at 111.

[3] Defendant argues that "some evidence" was introduced that established that defendant committed the crime in sudden passion or heat of blood. In reviewing this contention, we must [5] determine whether a rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found that the mitigatory factors were not established by a preponderance of the evidence. *Lombard*, 486 So.2d at 111. *See also Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The defense argues the jury was aware of the marital difficulties between defendant and Mary Snyder, of Mary's extramarital affair and instances of domestic abuse as a result of those affairs. Furthermore, the jury heard evidence that defendant wanted a reconciliation with Mary and that she was open to such a possibility. Finally, the jury was aware that defendant had paged Mary continuously before the murder in an attempt to contact her. The defense maintains that defendant's discovery of his wife on a late date with the victim, after she had made reconciliation plans with defendant, sufficed to deprive him of his self-control and cool reflection.

Although "some evidence" presented at trial supported a conclusion that the victim and defendant's wife were on a date, there was no evidence presented to support a determination that the two were involved in any type of sexual activity when defendant came upon them. Additionally, defendant's conflicting accounts of the incident make it difficult to determine his true motivation for the act. Defendant told police one version of the events and defense doctors yet another. The conflicting accounts given by defendant after the murder do not constitute affirmative, substantive evidence of his guilt, *State v. Savoy*, 418 So.2d 547 (La.1982), but they undoubtedly undercut the reasonableness of the principal defense theory of manslaughter.

[4] The State theorized that defendant was a remorseless killer who repeatedly stabbed his wife and the victim then fled the scene, disposed of the murder weapon and created a flimsy suicide theory when he decided to turn himself in to the police. The prosecution presented evidence which established beyond a reasonable doubt that the defendant was guilty of first degree murder. Defendant's own confession and the testimony of two witnesses demonstrated that defendant waited and watched the victim and his wife and then approached them, while armed with a knife, on his own accord. According to defendant, he suggested that the three of them "talk." No talking ever occurred, however. Instead, as both Mary Snyder and Gwen Williams testified, defendant brutally stabbed his wife and Howard Wilson and then fled from the scene. Consequently, the verdict reflects the evidence admitted at trial. Jurors may rationally [6] have concluded either that (1) defendant lied about the circumstances of the offense to excuse what the evidence otherwise overwhelmingly demonstrated, a specific intent homicide during a controversial course of action in which he also specifically intended to kill or to inflict great bodily harm on at least one other person (*i.e.*, his estranged wife); or (2) that a reasonable person would not have been provoked to homicidal passion by the sight of his estranged wife with another man. In either case, the evidence supported the jury's verdict and rejection of the defendant's manslaughter defense.[6]

6. The substantive definition of first degree murder under La. R.S. 14:30(A)(3) differs critically from the aggravating circumstance in La.C.Cr.P. art. 905.4(A)(4). The latter requires proof that the offender "knowingly created a risk of death or great bodily harm to more than one person" while the former requires proof that the offender had the "specific intent to kill or to inflict great bodily harm

Assignment of Error No. 2

Batson Claim

In his second assignment of error, defendant argues that the trial court erred in allowing the State to exercise five of its peremptory challenges against black prospective jurors in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Specifically, defendant contends that prospective jurors Jeffrey Brooks, Greg Scott, Thomas Hawkins, Jr., Elaine Scott, and Loretta Walker were impermissibly excluded by the State. The record of the voir dire proceedings reveals that the prosecutor used peremptory challenges to strike every African American called as a prospective juror who survived challenges for cause. This resulted in an all-white jury for the defendant, who is African-American.

Under *Batson* jurisprudence, a defendant must first establish a prima facie case of discrimination by showing facts and relevant circumstances that raise an inference that the prosecutor used his peremptory challenges to exclude potential jurors on the basis of race. If such a showing is made, the burden of production then shifts to the State to articulate a race-neutral explanation for the challenges. Finally, the trial court must determine whether the defendant carried his burden of proving purposeful discrimination. *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (Per Curiam); *see State v. Collier*, 553 So.2d 815 (La. 1989). The second step does not require an explanation that is persuasive, or even plausible, and unless a discriminatory intent is inherent in the State's explanation, the reason offered will be deemed race neutral. *Purkett*, 514 U.S. at 767, 115 S.Ct. at 1771. The ultimate burden of persuasion remains on the defendant to prove purposeful discrimination. *See State v. Green*, 94-0887, p. 28 (La.5/22/95), 655 So.2d 272, 290, and cases cited therein. A trial judge's determination pertaining to purposeful discrimination rests largely on credibility evaluations; therefore the trial judge's findings are entitled to great deference by the reviewing court. *Batson*, 476 U.S. at 98 n. 21, 106 S.Ct. at 1724 n. 21.

[5] As an initial matter, the defense failed to lodge an objection to the State's use of its peremptory challenges against jurors Greg Scott and Thomas Hawkins, Jr., although counsel did note for the record that both jurors were African-American.[7] According to defense counsel, when Scott and Hawkins were struck by the State, counsel felt that no "pattern" of exclusion had emerged because the State had accepted an African-American juror, Jeffery Brooks (who was later backstrick-

upon more than one person." A finding under La. R.S. 14:30(A)(4) will always support the existence of the aggravating circumstances in Article 905.4(A)(4), but the converse is not necessarily true. *See State v. Ortiz*, 96-1609, p. 17 (La.10/21/97), 701 So.2d 922, 933 ("For purposes of the guilt phase of the trial, it was not sufficient for the jury to find that defendant merely created a risk of the death of more than one person. The statute required the jurors to find that defendant actively desired the result that followed from his actions."). In this case, rational jurors could find on the evidence that defendant specifically intended to kill or to inflict great bodily harm upon Howard Wilson and Mary Snyder during a consecutive course of conduct which resulted in the death of at least one person and that defendant had therefore committed first degree murder as defined by La. R.S. 14:30(A)(4). *State v. Bourque*, 622 So.2d 198, 243 (La.1993); *State v. Johnson*, 541 So.2d 818, 826 (La.1989); *State v. Williams*, 480 So.2d 721, 726 (La.1985). *A fortiorari*, that evidence also supported the jury's finding of the aggravating circumstance in Article 905.4(A)(4) at the penalty phase of trial.

7. When the State excused Greg Scott, defense counsel stated, "I just need to note Mr. Scott is African American. I'd note that for the record. I'm not asking for anything." Rec. vol. 4, p. 831. Later, the State excused Thomas Hawkins, Jr. and defense counsel stated, "Note for the record that Mr. Hawkins is a black juror." Rec. vol. 4, p. 901. The prosecutor responded by asking, "Are you making a challenge that you want me to make—." Rec. vol. 4, p. 901. Defense counsel Vasquez then interjected, stating, "She didn't object." Rec. vol. 4, p. 901. No further discussion of these two jurors occurred.

en by the State).[8] Nevertheless, while defense counsel's choice not to object on *Batson* grounds until they felt a pattern of discrimination had emerged may have been a valid reason for delaying a request for a race-neutral explanation, it does not negate the fact that the State was never requested to provide a race-neutral explanation for its use of peremptory challenges on potential jurors Greg Scott and Thomas Hawkins, Jr. Even after lodging a *Batson* objection and requesting a race-neutral explanation for the State's challenge of other African-Americans, defense counsel never demanded such an explanation for these two jurors.

This court has traditionally applied La. C.Cr.P. art. 841 to errors occurring during voir dire.[9] It has consistently held that a defendant waives review of irregularities in the selection of the jury when an objection is not timely raised. *See State v. Potter*, 591 So.2d 1166, 1168 (La.1991) (failure to make *Batson* objection waived issue on appeal); *State v. Spencer*, 446 So.2d 1197, 1200 (La.1984) (review of improper exclusion of blacks from jury not preserved for appeal); *State v. Whitt*, 404 So.2d 254 (La.1981) (objection to failure to sequester jury at an earlier time waived); *State v. Bazile*, 386 So.2d 349 (La.1980) (improper procedure for selecting venire not reviewable where objection was made after jury was sworn); *State v. Qualls*, 377 So.2d 293, 298 (La.1979) (objection to State's use of peremptory challenges raised for first time on appeal came too late); *State v. Landry*, 262 La. 32, 262 So.2d 360 (1972) (issue waived where objection to three jurors improperly excluded for opposition to death penalty not timely made). With respect to prospective jurors Greg Scott and Thomas Hawkins, Jr., the defense failed to initiate the three-step *Batson* procedure properly and therefore the State did not offer race-neutral reasons for its challenges. Consequently, the trial court did not have the opportunity to rule on them. Defendant therefore waived any claim based upon the prosecutor's allegedly intentional discrimination against Greg Scott and Thomas Hawkins, Jr. and the issue is not properly before this court. *Potter*, 591 So.2d at 1168.

[6] Defense counsel did, however, lodge the proper *Batson* objections to the State's use of peremptory challenges against potential jurors Jeffrey Brooks, Elaine Scott and Loretta Walker. The State originally accepted Brooks as a juror, but later backstruck him. The prosecutor's reasons for striking Brooks were that he appeared "very nervous" throughout questioning and that he would be missing class, as a student teacher, if chosen to serve on the jury. The prosecutor stated, "He's a student teacher. My main concern is for that reason, that being that he might, to go home quickly, come back with guilty of a lesser verdict so there wouldn't be a penalty phase." Rec. vol. 4, p. 954. Defense counsel responded by stating:

> His main problem yesterday was the fact that he didn't know if he would miss some teaching time as a student teacher. The clerk called the school and whoever it was and the Dean said that wouldn't be a problem. He was told that this would go through the weekend, and he expressed that that was his only concern, that he didn't have any other problems.
>
> As far as him looking nervous, hell, everybody out here looks nervous. I'm nervous.

Rec. vol. 4, p. 955. The court allowed the State to exercise a peremptory challenge on Brooks.[10]

8. Defendant also claims in his brief that his trial attorneys rendered ineffective assistance of counsel in failing to lodge a *Batson* objection to the State's use of peremptory challenges against Greg Scott and Thomas Hawkins, Jr. This contention will be addressed later in this opinion.

9. La.C.Cr.P. art. 841 provides in pertinent part that "[a]n irregularity or error cannot be availed of after the verdict unless it was objected to at the time of occurrence."

10. After the trial court allowed the challenge, defense counsel stated for the record:

With respect to prospective juror Elaine Scott, the district attorney excused her, stating, "I observed she was very weak on her ability to consider the imposition of the death penalty. Her words, exactly—I wrote it down, that she thinks she could, and that's the reason for our challenge." Rec. vol. 4, p. 902. However, when asked again by the prosecution if she could impose the death penalty, she responded, "I could." Rec. vol. 4, p. 860. She also responded affirmatively when asked if she could listen to the evidence and consider whether to accept or reject the insanity defense and hold the defense to its burden of proof. Rec. vol. 4, p. 865–866. Nevertheless, the trial court accepted the State's explanation as race neutral and excused Elaine Scott.

The defense also lodged a *Batson* challenge when Loretta Walker was excused by the State. During voir dire Walker stated that she could not impose the death penalty based on her religious beliefs. Rec. vol. 4, p. 909. After further questioning, she did admit that under certain circumstances, for example if an innocent child was murdered, she could consider the death penalty. Rec. vol. 4, p. 921. Even though she was somewhat rehabilitated by the prosecutor, he excused her, stating, "The reason is very obvious that at first she said she could not do the death penalty for a long-standing, and then she said under a limited circumstance if he killed a child, she could do it. We don't have any evidence that this man killed a child, so." Rec. vol. 4, p. 958. The court allowed the State's challenge of Walker.

[7, 8] [10]The trial court entertained the State's race neutral reasons for the exclusions without making a finding as to whether defendant had made a prima facie showing of purposeful racial discrimination. A trial court's "demand that a prosecutor justify his use of peremptory strikes is tantamount to a finding that the defense has produced enough evidence to support an inference of discriminatory purpose." *State v. Green*, 94–0887, p. 25 (La.5/22/95), 655 So.2d 272, 288. Nevertheless, the issue of whether the defense established a prima facie case of discrimination is moot once the prosecutor has offered a race-neutral explanation for the peremptory challenge and the trial court has ruled on the ultimate question of intentional discrimination. *Id.* (applying *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991)). Nonetheless, any response will qualify as race neutral "unless a discriminatory intent is inherent in the prosecutor's explanation." *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991).

Here, the trial court did not find that defendant had established purposeful discrimination and overruled the *Batson* objections. These rulings appear correct. Although not required by the caselaw, the State's proffered reasons were plausible, supported by the record and race-neutral. *See, e.g., State v. Johnson*, 621 So.2d 1167 (La.App. 2 Cir.1993) (veniremen appeared inattentive and unresponsive or failed to maintain eye contact); *State v. McNeil*, 613 So.2d 752 (La.App. 4 Cir.1993) (same); *State v. Young*, 613 So.2d 631 (La.App. 1 Cir.1992) (same); *State v. Manuel*, 517 So.2d 374 (La.App. 5 Cir.1987) (same); *State v. Outley*, 629 So.2d 1243 (La.App. 2 Cir.1993) (veniremen young, inattentive, or knew defense counsel); *State v. Griffin*, 618 So.2d 680 (La.App. 2 Cir.1993) (veniremen all smiles and giggles during voir dire on the death penalty). *See also United States v. Cure*, 996 F.2d 1136 (11th Cir. 1993) (venireman inattentive); *cf. Hernandez*, 500 U.S. at 357, 111 S.Ct. at 1868 (State response will qualify as race neutral "unless a discriminatory intent is inherent in the prosecutor's explanation"). The prosecutor's reasons constituted "legiti-

> Your Honor, Mr. Brooks was the first African American chosen. The State subsequently proceeded to cut, at this point, it's either three or four and the record will reflect which it is, and the State has now gone back and cut the only African American that they chose. So that that [sic] needs to be on the record.
>
> Rec. vol. 4, p. 956.

mate" grounds for the exercise of a peremptory strike. *Purkett v. Elem*, 115 S.Ct. at 1771 ("What [*Batson*] means by a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection."). None of the reasons articulated by the State are readily associated with the suspect class that is alleged to be the object of the State's discriminatory use of peremptory challenges. Defendant, the opponent of the strikes, offered no facts or circumstances supporting an inference that the State exercised its strikes in a racially discriminatory manner. Therefore, the defendant's proof, when weighed against the prosecutor's offered race-neutral reasons, was not sufficient to prove the existence of discriminatory intent. *See State v. Green*, 94-0887 at p. 27, 655 So.2d at 289.

After carefully reviewing the entire record of voir dire, we find no abuse of discretion or error by the trial court in its denial of defendant's *Batson* claims. The trial court heard the prospective jurors and concluded there were reasonable bases for the challenges in question. The record does not show that the State employed a tactic of purposeful discrimination in its exercise of peremptory challenges.

[9] Defendant also argues that his attorneys were ineffective for failing to object to the prosecution's improper use of its peremptory challenges to exclude African Americans from the jury. Specifically, defendant points to counsel's failure to raise a *Batson* objection to the State's use of peremptory challenges on veniremen Greg Scott and Thomas Hawkins, Jr. Defendant maintains that his trial counsel erroneously believed that the presence of one African American juror, Jeffrey Brooks (who was later backstricken by the State) defeated any *Batson* claim. Defendant contends that this error prejudiced him because it allowed the prosecutor to exercise peremptory challenges to remove members of the defendant's race from the jury venire for a discriminatory purpose without having to provide a race-neutral reason.

Even assuming defense counsel erred in failing to make a *Batson* objection to the State's challenges of Greg Scott and Thomas Hawkins, Jr., this failure does not prejudice the defendant to the extent that the trial was rendered unfair and the verdict suspect. In *Allen v. Hardy*, 478 U.S. 255, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986), the United States Supreme Court held that *Batson* would not be applied retroactively on collateral review. The Court noted that retroactive effect is "appropriate where a new constitutional principle is designed to enhance the accuracy of criminal trials." *Allen*, 478 U.S. at 259, 106 S.Ct. at 2880. The Court found, however, that although "the rule in *Batson* may have some bearing on the truthfinding function of a criminal trial[,] ... the decision serves other values as well ... only the first of which may have some impact on truthfinding." *Id.* Because protections afforded by *Batson* did not go "to the heart of the truthfinding function," *Id.*, the Court held that *Batson* would not apply retroactively.

[10] While the instant case does not deal with the question of retroactivity, the Court's comments on the import of *Batson* are pertinent to the considerations present in the prejudice prong of the *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), two-part test used in ineffective assistance of counsel claims. Where a rule does not have "such a fundamental impact on the integrity of factfinding," *Allen*, 478 U.S. at 259, 106 S.Ct. at 2881, it cannot be said that the violation of such rule renders the trial unfair and the verdict suspect.[11]

11. As the *Allen* Court noted, the impact of the *Batson* rule is lessened because of the presence of other procedures that protect a defendant's interest in a neutral factfinder:

> Voir dire examination is designed to identify veniremen who are biased so that those persons may be excused through challenges for cause. Moreover, the jury charge typically includes instructions emphasizing that the jurors must not rest their decision on any impermissible factor, such as passion or prejudice.

Allen, 478 U.S. at 259 n. 2, 106 S.Ct. at 2881 n. 2. These other mechanisms existed prior to

Thus, counsel's failure to make a *Batson* objection did not prejudice defendant. Accordingly, this argument lacks merit.

Photographs

Defendant next argues that the trial court erred in overruling defense objections to the admissibility of certain State exhibits. Specifically, defendant complains of the introduction into evidence of three autopsy photographs of the non-fatal wound to Howard Wilson's left cheek.[12] Outside the presence of the jury, defense counsel stated the grounds for objecting to the photographs as follows:

> It's a wound from the ear to the mouth, and it was described as a hole in the decedent's face. The deputy testified that you could see into the hole and see the victim's tongue and his teeth. Those photographs show exactly that, and I don't think that the jury needs to see those photographs. Dr. Garcia, very fairly in her report, described this wound as nonfatal and in parenthesis, she let's [sic] us know how dramatic it is. She calls it "dramatic-appearing", and I think that that is a clue as to how prejudicial these photographs could be. It was—She clearly described this wound as nonfatal, and she clearly warned us that it was very dramatic-looking.
>
> There is no purpose. It doesn't establish cause of death. It doesn't show the jury anything other than how very gruesome this crime was. That has nothing to do with the very intellectual decision they have to make as to what kind of a murder it was. And this doesn't even show that it was a murder. This man would have fully recovered from this injury to his face, and I don't think that the jury needs to see what has already been testified to on the witness stand.

Rec. vol. 5, p. 1214.

[11–13] Contrary, however, to defendant's assertions here and the arguments of defense counsel during trial, the State is entitled to the moral force of its evidence. *State v. Robertson*, 97–0177, p. 29 (La.3/4/98), 712 So.2d 8, 32. Postmortem photographs of murder victims are admissible to prove corpus delicti and to corroborate other evidence establishing cause of death and location and placement of wounds, as well as to provide positive identification of the victim. *Robertson*, 97–0177 at p. 29, 712 So.2d at 32; *State v. Koon*, 96–1208 (La.5/20/97), 704 So.2d 756; *State v. Maxie*, 93–2158 (La.4/10/95), 653 So.2d 526; *State v. Martin*, 93–0285 (La.10/17/94), 645 So.2d 190. Photographic evidence will be admitted unless it is so gruesome that it overwhelms the jurors' reason and leads them to convict defendant without sufficient other evidence, *i.e.*, when the prejudicial effect of the photographs substantially outweighs their probative value. *Robertson*, 97–0177 at p. 29, 712 So.2d at 32; *State v. Perry*, 502 So.2d 543, 558 (La.1986), *cert. denied*, 484 U.S. 872, 108 S.Ct. 205, 98 L.Ed.2d 156 (1987).

[14] A review of the photographs complained of reveals that while the photographs of the wound to decedent's face are particularly graphic, they are relevant to illustrate the number and location of stab wounds to the victim. Additionally, the force necessary to inflict such a wound is also relevant to show defendant's specific intent to kill or to inflict great bodily harm. As such, the photographs' probative value outweighed any prejudicial effect. La. C.E. art. 403. The trial judge did not err in ruling that the photographs were admissible. Consequently, this portion of this assignment of error lacks merit.

the *Batson* decision, "creating a high probability that the individual jurors seated in a particular case were free from bias." *Allen*, 478 U.S. at 259, 106 S.Ct. at 2881.

12. Although defense counsel does not refer to the specific exhibit numbers, the pictures described in the brief relate to State's Exhibits Nos. 13, 14 and 15.

Defendant also complains of the admission of another series of photographs which depict him in a variety of martial arts poses. Some photographs depict defendant in a martial arts stance holding a knife-like weapon. Specifically, defendant contends that the photographs were erroneously admitted into evidence because they were remote in time, irrelevant and were introduced solely to prejudice defendant and show defendant was a "bad guy." The State, on the other hand, contends that the photographs were particularly relevant considering the suddenness and savagery of the attacks, the fact that the weapon used was some kind of double-edged knife and defendant's statement that he was "not familiar with, ha, with knives in a way." The State argues the photographs were admissible not only to refute defendant's statement that he was not familiar with knives, but also to show his obvious skill in using them.

Louisiana C.E. art. 401 provides that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." All relevant evidence is admissible, except as otherwise provided by law, and irrelevant evidence is not admissible. La. C.E. art. 402. However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, or waste of time. La. C.E. art. 403. Additionally, any photographic evidence which illustrates any fact, sheds light upon any issue in the case, or reliably describes a person, place or thing involved in the case, is admissible subject to a La. C.E. art. 403 balancing test. *State v. Lindsey*, 404 So.2d 466 (La.1981).

In the instant case, the determination of whether the photographs at issue are relevant to show the existence of any fact at trial is a close one. The prosecutor argued at trial that the photographs demonstrated defendant's martial arts training and disproved his assertion in his statement to the police that he had acted in self-defense during a struggle with the victim. The photographs, however, were taken more than ten years before trial, before defendant had even met his wife. The photographs were therefore remote in time. Moreover, the State's argument that the photos refute some vague assertion of self-defense made by defendant is also questionable because the fact that defendant had served in the military and had martial arts training did not automatically negate a claim of self-defense. On the other hand, the prosecution's argument that the pictures refuted defendant's statement that he was not familiar with knives has some merit.[13] The pictures showing defendant posed with the knife-like weapon clearly serve to rebut this statement. Additionally, as the State argues, the photographs can be viewed as evidence of defendant's specific intent to kill as they suggest he has experience and skill in the use of knives as weapons.

Although the photographs are arguably relevant even in light of the fact they were taken more than ten years before the crime occurred, their potential to prejudice the jury is certainly present. Considering the fact that defendant was charged with the brutal stabbing of his wife and her male companion, photographs depicting him in an "attack" position with what look like knives in his hands could give the jury a picture of him as a "bad man" and someone likely to commit such a crime. Thus, the probative value of the photographs was slight when compared to their tremendous potential to inflame the jury.

[15] However, although the trial court arguably erred by admitting the photographs, the error was harmless at the guilt

13. When asked to describe the knife he brought with him when he was looking for his wife, defendant told police:

> Well it was a brown and blue handle. It's a steak knife I believe . . . . I'm not familiar with, ha, with knives in a way.

Transcribed Audio Statement, p. 6.

phase. To determine whether an error is harmless, the proper analysis is "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *State v. Bourque*, 622 So.2d 198, 241 n. 20 (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993)) (emphasis in original). In the instant case, the jury heard the testimony of the surviving victim and an eyewitness who described in detail defendant's brutal stabbing of the victim. Additionally, the jury also had access to defendant's inculpatory statements in which he confessed to the crime. In light of the overwhelming evidence against defendant, the erroneous admission of the photographs was unimportant in relation to the entire body of evidence presented at the guilt phase. Accordingly, the jury's rejection of defendant's proffered defenses was "surely unattributable to the error." *Id.* Thus, the trial court's admission of the photographs, even if in error, was harmless at the guilt phase and this portion of the assignment of error lacks merit.

[16, 17] Likewise, the admission of the photographs at the penalty phase was also harmless. An error committed in the penalty phase is harmless if the sentence actually rendered in this trial was surely unattributable to the error.[14] *State v. Bourque*, 622 So.2d at 241 n. 20. At the penalty phase, the complained of photographs paled in comparison to the violence of the crime already described in detail to the jurors and the overwhelming testimony of the various instances of domestic abuse Mary Snyder suffered at the hands of defendant. Testimony revealed that defendant had hit his wife with a baseball bat, threatened to hit her with a hammer, slammed her head into a bedroom wall, smashed her head against a windshield and stabbed her with a screwdriver. The photographs of defendant obviously posing for the camera with knife-like objects did not add any arbitrary factor into the jury's deliberations in light of this testimony. Thus, in this particular case, we conclude there is not a reasonable possibility that the introduction of the photographs at the penalty phase contributed to the sentence and their admission was harmless beyond a reasonable doubt. Consequently, this portion of this assignment of error is without merit.

Prosecutor's Argument

[18] Defendant contends it was reversible error for the prosecutor to refer to the O.J. Simpson case during his closing argument in the penalty phase. Defendant points to the following exchange which occurred during the State's rebuttal argument:

State: Mr. Vasquez [defense counsel] tried to describe this man as being the man who—And it was 12 hours later when he called the Kenner Police Department, huddled up, claiming that he was suicidal, barricaded himself in the house. That made me think of something. Made me think of another case, the most famous murder case in the last, in probably recorded history, that all of you all are aware of—

Defense: Your Honor, I object. I want to approach on this.

Court: Okay. Counsel, come forward.

(Whereupon, the following is taken at the bench, out of the hearing of the jury.)

Defense: He's going to mention the O.J. Simpson trial.

State: That case—

Defense: I object to that.

14. In *Chapman* and *Sullivan*, the harmless error rule was applied to the jury's decision to convict rather than to its sentencing decision. Nevertheless, the harmless error analysis has subsequently been used in reviewing the alleged prejudicial impact of errors in the penalty phase of capital trials. *See State v. Lee*, 524 So.2d 1176, 1192 n. 4 (La.1987) (on rehearing).

State: Your Honor, based upon what he did in this case, where he sat for about 12 hours, he huddled and pretended to kill himself, just like O.J. did and just like O.J. got away it [sic]. I think that's fair—

Defense: That's ridiculous.

State: It's a fair comment and those people will decide what weight they want to give to it.

Defense: Judge, that's—

State: That is as ridiculous as some of the things you said, and I think that's fair comment on something that's common knowledge. And certainly, those people are intelligent enough to give it whatever weight they want to.

Court: I'm going to allow it.

Defense: Note our objection. Please note our objection.

(Whereupon, the following is taken in the hearing of the jury.)

State: The most famous murder case, and all of you all have heard about it, happened in California very, very, very similar to this case. The perpetrator in that case claimed that he was going to kill himself as he drove in a Ford Bronco and kept the police off of him, and you know what, he got away with it. Ladies and Gentlemen, is it outside the realm of possibility that that's not what that man was thinking about when he called in and claimed that he was going to kill himself?

Rec. vol. 7, p. 1591. Specifically, defendant alleges the comments by the prosecutor were so prejudicial that they influenced the jury and contributed to their decision to impose the death penalty. Defendant claims that "it has been proved by countless polls that the majority of white Americans believe that O.J. Simpson was guilty of murdering his wife and, by virtue of the not guilty verdict returned in him criminal case, that he 'got away with murder.'" Br. at 27. Consequently, the defense argues, because the defendant is African-American and the jury was all white, the effects of the prosecutor's comments were devastating.

[19, 20] Louisiana C.Cr.P. art. 774 provides that the scope of argument "shall be confined to evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case." Article 774 further provides that the argument "shall not appeal to prejudice." Nevertheless, a prosecutor retains "considerable latitude" when making closing arguments. *State v. Taylor*, 93-2201 p. 19 (La.2/28/96), 669 So.2d 364, 374. A conviction or sentence will not be reversed for improper closing argument unless this court is thoroughly convinced the remarks influenced the jury and contributed to the verdict. *Taylor*, 93-2201 at p. 21, 669 So.2d at 375; *State v. Kyles*, 513 So.2d 265, 275 (La.1987); *State v. Knighton*, 436 So.2d 1141, 1152 (La.1983). Even where the prosecutor's statements are improper, credit should be accorded to the good sense and fairmindedness of the jurors who have heard the evidence. *Kyles*, 513 So.2d at 276; *State v. Jarman*, 445 So.2d 1184, 1187 (La.1984).

In the instant case, even assuming the prosecutor's statements regarding the O.J. Simpson case were improper, it cannot be said they created a substantial risk that the death penalty would be imposed under the influence of passion, prejudice or arbitrary factors. Thus, in light of the deference given to the good sense and fairmindedness of jurors and after reviewing the comments as a whole, we are not firmly convinced that they influenced the jury or contributed to the verdict. This portion of the assignment of error is without merit.

Assignments of Error Nos. 3 and 4

In these assignments of error, defendant argues that the trial court erred in failing to continue the trial to allow defense counsel adequate time to prepare and to develop a defense of insanity. Specifically, defendant argues that the trial court's denial of a continuance to allow his anti-depressant medication enough time to remedy his

unfocused, tangential and circumstantial ideation rendered him unable to effectively communicate with his attorney and therefore unable to assist his counsel. According to the defense, defendant's mental instability at the time of trial, which included difficulties in focusing on questions and in answering them in a coherent manner, caused him to be incapable of testifying in his own defense. Br. at 15.

Prior to the trial, defendant filed a motion to appoint a sanity commission in which it was alleged that defendant had been diagnosed with a depressive disorder since his incarceration and was under the care of the Jefferson Parish Prison psychiatrist, Dr. Richard Richoux. Furthermore, the motion stated that defendant's counsel had noted what she believed "may be a deterioration in defendant's mental capabilities, particularly in relation to his ability to assist in his defense." Specifically, defendant's attorney noted that defendant "appears to counsel to be severely depressed, and has been increasingly unfocused, scattered, and poorly communitative [sic] in interviews. Defendant is unable to answer even simple questions regarding the facts of his case." Rec. vol. 1, p. 144. This motion was granted on July 29, 1996.

On August 1, 1996, defendant was examined for his competency to stand trial by Dr. Debra DePrato, a forensic psychiatrist, and Dr. Barbara McDermott, a clinical psychologist. A sanity hearing was held on August 8, 1996, in which Dr. DePrato testified that in her opinion, defendant "is able to assist in his own defense as well as understand the proceedings against him." Rec. vol. 2, p. 372. However, Dr. DePrato testified that defendant had some difficulty focusing on certain issues and became mildly circumstantial and tangential. Because of these difficulties, Dr. DePrato reiterated the recommendation contained in her report that defendant's medication prescribed for the treatment of depression be changed from Sinequan to Prozac or Zoloft. She testified this change in medication was necessitated by the fact that defendant could only tolerate very low dosages of Sinequan, which did not totally alleviate defendant's symptoms, before bothersome side effects occurred. Regarding this change in medication, Dr. DePrato testified as follows on cross-examination by defendant's attorney:

> Q. [I]s it your opinion that he needs to have his medication changed because the side effects are making it impossible to up his dosage?
>
> A. Well, there's really two reasons, if I can explain.
>
> Q. Sure.
>
> A. Dr. Richoux has felt that Mr. Snyder was depressed since his incarceration. He's been on Sinequan, off and on, and hasn't been able to take it at times because of the side effects of that medication. So that he hasn't been on it consistently enough, I think for it to help, as well as, if his dosage was increased, it may have helped more. But because of urinary retention, constipation, those kind of side effects, the dosage hasn't been able to be increased. So it's really a combination of things. So that I don't really know that it's been very effective at all, because he hasn't been on it as consistently as he should have been also.
>
> Q. If he were placed on medication which did not cause these side effects so that he could be placed on a proper dosage, how long do you think it would be before the symptoms were alleviated to the point where he could possibly—where the symptoms—where he could possibly focus more?
>
> A. Typically, a medication like I'm recommending, Prozac or Zoloft doesn't interfere with urinary retention problems. So he shouldn't have any problems with that. You can see benefits from one to two weeks in attention and concentration, but full benefits are about six weeks later. So some people begin to respond immediately while the full maximum potential can take about six weeks.
>
> Q. Okay. And you have made that recommendation, and you have asked that a

copy of your report be sent to Dr. Richoux?

A. Yes. I feel the jail would benefit from a copy so we would—they would know our recommendations regarding that since they were concerned about his issue of competency as well.

If I could add one thing about the symptoms, I forgot—

Q. Sure.

A. —to mention. One of the symptoms Mr. Snyder complained about that is probably a side effect of this medication was kind of light-headedness or feeling cloudy headed which is a common side effect of Sinequan. So if stopped that, that would stop immediately.

Q. Okay.

A. Or get better.

Q. Could I ask you just briefly about your conclusions—you indicate the [sic] he occasionally has difficulty focusing on questions asked of him, and becomes mildly circumstantial and tangential. That's what you were describing a few questions ago?

A. Tangential means getting off the subject, and circumstantial means giving a lot of over-detailed information without really giving the information you need.

Q. Okay. And Doctor, is it your opinion that a change in medication could alleviate both symptoms that make it difficult to communicate with him?

A. Yes. It could improve those.

Rec. vol. 2, p. 374. Following the testimony of Dr. DePrato, both parties stipulated that if Dr. McDermott, the psychologist who examined defendant along with Dr. DePrato, were called to testify, her testimony would essentially be the same as that of Dr. DePrato. Rec. vol. 2, p. 376.

At the conclusion of the sanity hearing, the trial court found defendant competent to stand trial, stating only, "The Court finds that Mr. Snyder is able to understand the proceedings against him, and is able to assist in his defense. And therefore, is competent to stand trial." Rec. vol. 2, p. 377.

On August 16, 1996, defendant's medication was changed from Sinequan to Prozac by defendant's attending psychiatrist at the Jefferson Parish Correctional Center. Defense counsel then moved for a five-week continuance so that defendant could receive the full benefit of the new medication which would allow his mental state to improve to the point where he could fully assist his counsel. A hearing on this motion was held on August 20, 1996. At this hearing, defense counsel introduced and filed into the record a letter from Dr. Richoux, defendant's attending psychiatrist, to the trial judge which states that effective August 16, 1996, defendant's antidepressant medication had been changed to Prozac and that it would take approximately six weeks for defendant to attain the maximum therapeutic benefits of the new drug. Dr. Richoux informed the court that the change in medication was necessary because "Mr. Snyder continues to display severe depressive symptoms that may interfere with his ability to assist his attorney...." Although defendant's counsel stated at this hearing that defendant was "technically" competent, her argument was directed at defendant's alleged inability to assist in his own defense. Rec. vol. 2, p. 411. Defense counsel told the court she was requesting a five-week continuance so that defendant could receive the full benefit of the new medication which would allow him to have "every bit of my assistance, which I cannot render adequately at this time." Rec. vol. 2, p. 408.

Although the trial court noted that Dr. Richoux's report stated that defendant's symptoms may interfere with his ability to assist his attorney, rec. vol. 2, p. 410, defendant's request for a continuance was denied. In denying the request, the court stated only, "Well, based on Dr. Deprado's [sic] testimony and in her report that he is—that the symptoms do not interfere with his ability to understand the proceed-

ings against him or to assist in his defense, I'm going to go ahead and deny the motion." Rec. vol. 2, p. 412.

On August 22, 1996, defendant was given a psychological evaluation by Dr. Elaine Salzer, a clinical psychologist. Although she was not called to testify at trial because she was out of town at the time, her report was proffered by the defense. Dr. Salzer's report notes that defendant had been on Prozac for about one week prior to her examination and, at the time of the examination, had not had sufficient time to stabilize on this medication. Dr. Salzer's report also observes that once defendant's condition stabilizes on the medication, it is reasonable to assume that his cognitive processes should become sharper and more focused.

On August 27, 1996, a motion for *in camera* testimony by the defense attorney regarding defendant's ability to assist counsel was filed and heard. In this motion, defense counsel asked that she be allowed to present *in camera* testimony detailing the difficulties she experienced in communicating with defendant which rendered him unable to assist in his defense and therefore rendered her assistance ineffective. Defendant's attorney sought to give this testimony *in camera*, out of the presence of the Assistant District Attorney, because of the confidential nature of the attorney-client communications at issue. The trial court summarily denied the motion for *in camera* testimony, but allowed defense counsel to testify in open court as to her concerns regarding matters of a non-confidential nature. Defendant's attorney testified that her representation of Mr. Snyder had been compromised by his state of mind, due to the fact that he had been severely depressed and inadequately treated. Rec. vol. 2, p. 474.

[21, 22] As a general matter, the decision to grant or deny a motion for continuance rests within the sound discretion of the trial judge, and a reviewing court will not disturb a trial court's determination absent a clear abuse of discretion. La. C.Cr.P. art. 712; *State v. Strickland*, 94-0025, p. 23 (La.11/1/96), 683 So.2d 218, 229; *State v. Bourque*, 622 So.2d 198, 224 (La. 1993), *overruled on other grounds by State v. Comeaux*, 93-2729 (La.7/1/97), 699 So.2d 16. Whether a refusal to grant a continuance was justified depends on the circumstances of the particular case presented. *State v. Bourque*, 622 So.2d at 224; *State v. Simpson*, 403 So.2d 1214, 1216 (La. 1981). Generally, this court declines to reverse convictions for improper denial of a motion to continue absent a showing of specific prejudice. *State v. Strickland*, 94-0025 at p. 23, 683 So.2d at 229; *State v. Gaskin*, 412 So.2d 1007, 1011 (La.1982).

[23-26] Limits on the court's discretion to grant or deny a continuance, however, are imposed by defendant's constitutional rights, including his rights to understand the proceedings against him, to assist in his defense, and to the assistance of counsel. *See United States v. Soldevila-Lopez*, 17 F.3d 480, 487 (1st Cir.1994). If a defendant lacks the ability to communicate effectively with counsel, he may be unable to exercise other rights deemed essential to a fair trial. *Cooper v. Oklahoma*, 517 U.S. 348, 364, 116 S.Ct. 1373, 1381, 134 L.Ed.2d 498 (1996). Constitutional due process requires that the trial of an accused be conducted only when he is legally competent. *Bishop v. United States*, 350 U.S. 961, 76 S.Ct. 440, 100 L.Ed. 835 (1956); *State v. Nomey*, 613 So.2d 157 (La.1993). The test for determining defendant's mental competency depends upon "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 403, 80 S.Ct. 788, 789, 4 L.Ed.2d 824 (1960). Defendant's allegations that he was unable to communicate with his attorney thus raise serious constitutional issues. Because the record reflects that the trial court failed to make further inquiry into defendant's claims that he needed to be stabilized on his new medication in order to effectively

communicate with his counsel and assist in his defense when such claims, combined with objective medical evidence, raised a sufficient doubt as to defendant's competence, we must question whether defendant received a fair trial in this regard.

In *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975), the Court reversed petitioner's conviction because the record before it revealed that the lower courts failed to give proper weight to information suggesting petitioner's incompetence that came to light during trial. The Court found that the failure to make further inquiry into petitioner's competence to stand trial denied him a fair trial. In reaching its conclusion, the Court stated:

> The sentencing judge and the Missouri Court of Appeals concluded that the psychiatric evaluation of petitioner attached to his pretrial motion for a continuance did not contain sufficient indicia of incompetence to stand trial to require further inquiry. Both courts mentioned aspects of the report suggesting competence, such as the impressions that petitioner did not have 'any delusions, illusions, hallucinations . . .,' was 'well oriented in all spheres,' and 'was able, without trouble, to answer questions testing judgment,' but neither court mentioned the contrary data. The report also showed that petitioner, although cooperative in the examination, 'had difficulty in participating well,' 'had a difficult time relating,' and that he 'was markedly circumstantial and irrelevant in his speech.' In addition, neither court felt that petitioner's episodic irrational acts described in the report or the psychiatrist's diagnoses of '(b)orderline mental deficiency' and '(c)hronic (a)nxiety reaction with depression' created a sufficient doubt of competence to require further inquiry.

Id. at 175, 95 S.Ct. at 905.

The Court noted that it did not appear the examining psychiatrist was asked to specifically consider the issue of petitioner's competence to stand trial and, like the report itself, the petitioner's "somewhat inartfully drawn motion for a continuance" did not clearly suggest that petitioner's competence to stand trial was the question sought to be resolved. However, it found the sentencing judge erred in concluding that counsel's pretrial contention that "the defendant is not a person of sound mind and should have a further psychiatric examination before the case should be forced to trial" did not raise the issue of petitioner's competence to stand trial. Finally, the Court concluded that at the stage at which the pretrial motion for continuance was filed, "it would have been, at the very least, the better practice to order an immediate examination under [Missouri law]." *Id.* at 177, 95 S.Ct. at 906.

Similarly, in *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), the Court held that the failure to observe procedures adequate to protect a defendant's right not to be tried while incompetent deprives him of his due process right to a fair trial. There, the Court expressed doubt as to whether a defendant can waive the defense of his competence to stand trial, stating, "But it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." *Id.* at 384, 86 S.Ct. at 841. The Court also noted that even when a defendant does not explicitly state that competence to stand trial is at issue, trial judges must consider the question of competency where the evidence presented raises a doubt as to defendant's competence. *Id.* at 384 n. 6, 86 S.Ct. at 841 n. 6.

[27, 28] Thus, if there is a sufficient doubt as to the mental competency of an accused, the trial court has a responsibility to order a hearing *sua sponte*. *Griffin v. Lockhart*, 935 F.2d 926 (8th Cir.1991). The *Pate* procedural guarantee is violated when, in light of what was then known to the trial court, the failure to make further inquiry into defendant's competence to stand trial denied him a fair trial. *Lokos*

v. Capps, 625 F.2d 1258, 1261 (5th Cir.1980) (citing *Drope*, 420 U.S. at 174, 95 S.Ct. at 905). The relevant question is: "Did the trial judge receive information which, objectively considered, should reasonably have raised a doubt about defendant's competency and alerted him to the possibility that the defendant could neither understand the proceedings or appreciate their significance, nor rationally aid his attorney in his defense." *Lokos*, 625 F.2d at 1261.

Although defendant's counsel stated in the hearing on the motion to continue that defendant was "technically" competent, her arguments raised the issue of whether defendant could communicate with her well enough to allow her to effectively assist him. A comprehensive reading of her arguments regarding defendant's inability to communicate leads us to believe that defense counsel's statements which seemingly concede defendant's competence actually referred to that prong of competence relating to defendant's capacity to understand the proceedings against him. Obviously, her complaints of difficulty in communicating with defendant which hindered her ability to assist him and her references to Dr. Richoux's letter which stated that defendant's depressive symptoms may interfere with his ability to assist his attorney relate to defendant's ability to assist in his defense. These complaints, coupled with the medical evidence presented, while not necessarily dispositive of the competency issue, were nevertheless sufficient to warrant the trial court's attention. Its failure to further inquire into defense allegations that defendant was experiencing difficulties in communicating with his attorney was therefore error.

[29] At the time defendant's motion to continue the trial was heard, the trial court had before it the report and testimony of a psychiatrist and a clinical psychologist which opined that defendant was competent to stand trial, but had difficulty focusing on questions asked of him and became mildly circumstantial and tangential and consequently would benefit from a change in medication to control his depressive disorder. Additionally, testimony revealed that once this change in medication occurred, it would take six weeks for defendant to receive the maximum benefits of the new drug. Moreover, the trial court had before it a letter from defendant's attending psychiatrist stating that defendant's medication had been changed because of defendant's display of severe depressive symptoms "that may interfere with his ability to assist his attorney" and that it would take approximately six weeks for defendant to attain the maximum therapeutic benefits of the new medication. The trial court was also aware of defense counsel's allegations that defendant's thinking was attenuated and he needed to be stabilized on the new medication before he could adequately assist in his defense. This evidence, centering on defendant's difficulties in communicating and alleged inability to assist counsel, should have raised a question of defendant's competence in the judge's mind. As was noted in *Cooper v. Oklahoma*, 517 U.S. 348, 354 n. 4, 116 S.Ct. 1373, 1377 n. 4, 134 L.Ed.2d 498 (1996), "Indeed the right not to stand trial while incompetent is sufficiently important to merit protection even if the defendant has failed to make a timely request for a competency determination." *See also* La.C.Cr.P. art. 642.[15] This is nevertheless true even in the face of defense counsel's statements that she was not asking for the continuance on the ground of defendant's incompetence, for, as noted above, her arguments were actually directed to his competence and it is doubtful that defendant can waive his due

15. La.C.Cr.P. art. 642 provides:
> The defendant's mental incapacity to proceed may be raised at any time by the defense, the district attorney, *or the court*. When the question of the defendant's mental incapacity to proceed is raised, there shall be no further steps in the criminal prosecution, except the institution of prosecution, until the defendant is found to have the mental capacity to proceed.
(Emphasis added.)

process right not to stand trial while incompetent.

With all of the evidence before it that at least raised some question as to defendant's competency, particularly as to his ability to assist counsel before he was fully stabilized on new medication, the trial court failed to make any investigation into the validity of these concerns. The trial judge did not, for example, interview defendant on the record nor did he ask defense counsel to elaborate on the problems defendant was experiencing. In fact, when defense counsel asked to give the court specific examples of the difficulties she was encountering, she was summarily denied the opportunity to do so. It is not that we believe defendant was in fact unable to assist his attorney or that he was otherwise incompetent. Rather, it is the trial court's absolute failure to investigate these claims, which were substantiated by objective medical evidence, that causes us to determine he abused his discretion in failing to investigate defense claims of incompetence.

[30] Although Drs. DePrato and McDermott concluded that defendant was able to understand the proceedings against him and was able to assist in his own defense at the time of their evaluation of him, the trial court could not base its decision regarding defendant's competency solely on the conclusions of these doctors, especially in light of the medical evidence presented after the evaluation was completed. As we noted in *State v. Bennett*, 345 So.2d 1129, 1137 (La.1977) (on rehearing), "[T]he trial court may not rely so extensively upon medical testimony as to commit the ultimate decision of competency to the physician." The facts to consider in determining a defendant's ability to assist in his defense include: whether he is able to recall and relate facts pertaining to his actions and whereabouts at certain times; whether he is able to assist counsel in locating and examining relevant witnesses; whether he is able to maintain a consistent defense; whether he is able to listen to the testimony of witnesses and inform his lawyer of any distortions or misstatements; whether he has the ability to make simple decisions in response to well-explained alternatives; whether, if necessary to defense strategy, he is capable of testifying in his own defense; and to what extent, if any, his mental condition is apt to deteriorate under the stress of trial. *Bennett*, 345 So.2d at 1138. The record contains no evidence that the trial court considered any of these fa. ors when the question of defendant's ability to assist in his own defense was raised.

Had the record in this case contained some affirmative evidence that the trial judge conducted any investigation into defense allegations that defendant could not assist his counsel, our result may have been different. For example, in *United States v. Lopez*, 71 F.3d 954 (1st Cir.1995), *abrogated on other grounds by United States v. Wells*, 519 U.S. 482, 117 S.Ct. 921, 137 L.Ed.2d 107 (1997), defendant learned he had a small brain lesion or tumor about two weeks into his trial. After a recess, a hearing was held to consider defendant's motions for a mistrial based on lack of competency or for a continuance for purposes of treatment. The court observed that defendant was not claiming that he was incompetent; instead, he argued that the trial court's failure to halt the proceedings so that defendant could have surgery violated his constitutional rights by imposing a regime of medication that so impaired his abilities that he was unable to testify coherently on his own behalf. The basis of defendant's arguments was that medications prescribed for his condition caused side effects, such as grogginess, that interfered with his ability to proceed and his attorneys stated that defendant had problems communicating with them and was not able to cooperate fully. Following several examinations by doctors and its own observations, the trial court denied the motion and the trial continued, with defendant testifying in his own defense. The court of appeals, citing the careful investigation of the trial court into

the matter, found no abuse of discretion, stating:

> Lopez' health obviously warranted an inquiry by the trial judge. Far from ignoring the issue, the trial court deferred trial for a substantial period, summoned medical experts one after another, took an active role in securing diagnoses for Lopez, had him re-examined repeatedly, and took testimony and made findings in abundance, including a detailed post-trial order summarizing the court's findings and reasons for proceeding with trial.
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> * * *
>
> Lopez' main trial counsel did protest at times that his client was not able to cooperate fully; but these complaints of Lopez' conduct during trial are balanced, if not outweighed, by the district court's findings that Lopez appeared to be well oriented and was cooperating with counsel.

Id. at 958.

Other courts have also affirmed a trial court's denial of a continuance in circumstances similar to the ones presented in *Lopez*, but in those cases the record clearly supported the trial court's decision. The defendant in *United States v. Moore*, 27 F.3d 969 (4th Cir.1994) requested a continuance, contending he was physically and psychologically unable to stand trial and psychologically unable to assist in his defense. After a hearing on the motion in which a letter from defendant's psychiatrist was produced which stated that defendant was suffering anxiety and depression that impaired his ability to assist in his defense, the court denied the motion. The appellate court declined to reverse the court's ruling, finding that sufficient evidence was presented to support the trial court's ruling. For example, defendant's counsel conceded that defendant had actively participated in readying his defense by contacting and interviewing witnesses, preparing documents and working closely with his attorneys. Additionally, the trial court observed on the record that defendant "did not appear to be in any acute distress and consulted with his counsel throughout the proceedings." *Moore*, 27 F.3d at 973. In *United States v. Nasim*, 932 F.2d 964 (4th Cir.1991) (unpublished per curiam), defendant moved for a continuance based on the unavailability of medications prescribed by his doctor. The trial court denied the motion. The court of appeals found no abuse of discretion in the denial because defense counsel advised the court that his client was able to communicate with him about the issues in the case and the trial court itself noted that defendant sounded "perfectly rational." Finally, in *Fisher v. State*, 736 P.2d 1003 (Okla. Crim.App.1987), defendant requested a continuance during his trial, contending he had taken two tablets of Mellaril to control his anxiety which he had "saved" from the jail and the medication made him feel intoxicated, drowsy and unable to think clearly. The trial court conducted an *in camera* hearing at which defendant's doctor testified that even if defendant had taken two tablets at the time he said he did, the effects of the medication would have worn off in six hours and two witnesses testified that defendant acted no differently on this day than on any other and did not appear to be under the influence of any drugs. The trial court denied the motion, stating that even if he had taken the medication, defendant's ability to think or to communicate had not been impaired. Defendant then took the stand and testified coherently in his own defense. The reviewing court held that, on the record before it, it could not find an abuse of discretion in the trial court's denial.

Unlike the records present in the cases discussed above, the record before us gives us no basis upon which to determine that the trial court did not err in failing to make further inquiry into defendant's competency. In contrast to the *Lopez* court, the trial court in this case did not undertake any investigation into the allegations made by defense counsel that defendant was having difficulties communicating with her. Such an investigation was warranted in light of the fact that Drs. DePrato, McDermott, Richoux and Salzer all believed that defendant's condition necessi-

tated the change in medication and that it would take approximately six weeks for the drug to reach its maximum effectiveness. There is no affirmative indication on the record by the judge, the district attorney or the defense attorneys that the defendant could, in fact, or did, in fact, assist his attorney. Furthermore, defendant did not testify in either phase of his trial, so we cannot review his testimony and determine whether he had any significant difficulties in communicating. Finally, when defendant's counsel offered to specify for the record the difficulties she was experiencing in attempting to represent defendant, she was prevented from doing so by the trial judge. For all of these reasons, we cannot say with certainty whether defendant received a fair trial. Consequently, the record before us does not permit us to find that the trial court did not err in failing to make further inquiry into defendant's competency.

[31] Having found that the trial court abused its discretion in failing to investigate defendant's claims of incompetency, we must now determine the proper remedy. In the instant situation, we believe a nunc pro tunc hearing to determine whether defendant was competent at the time of his trial is appropriate if a meaningful inquiry into defendant's competency can still be had.

In *State v. Nomey*, 613 So.2d 157 (La. 1993), defendant was allowed to plead guilty to first degree murder one day after the members of a sanity commission conducted their examinations. In a motion for post-conviction relief, defendant argued the trial court's failure to conduct a hearing on the issue of his sanity prior to accepting his guilty plea violated his due process rights. The trial court denied the request for post-conviction relief, but on appeal the court of appeal ordered the trial court to conduct an evidentiary hearing to determine defendant's capacity to proceed at the time of the entry of the plea. After the hearing, the trial court held defendant had the capacity to proceed when the plea was entered. The court of appeal affirmed this determination. This court held the court of appeal erred in remanding the case for a retroactive sanity hearing because the trial court's acceptance of the plea without first resolving the issue of defendant's competency violated defendant's due process rights. The court did, however, note the following:

> The present case is distinguishable from a case such as *State v. Bennett*, 345 So.2d 1129 (La.1977). In *Bennett*, the sanity hearing was held, but the examining physicians admitted that they could not be certain of their results without further clinical evaluation of defendant. The trial judge failed to order additional testing upon defendant's request. Defendant was thereafter found guilty as charged by a jury. On appeal, we remanded for another sanity hearing following a complete reexamination of the defendant. Unlike the present case, the defendant in *Bennett* did receive a hearing, at which the members of the sanity commission testified. Further, the defendant in *Bennett* alleged he suffered from mental retardation, which we found to be a more static condition than mental illness. Hence, under certain limited circumstances, a retroactive determination of sanity may be permissible. Likewise, we do not mean to foreclose the possibility of a nunc pro tunc competency hearing, if a meaningful inquiry into defendant's competence can still be had, in those cases where the trial judge ignores a bona fide doubt as to defendant's competence to stand trial, or the issue of competence is not raised at trial. *See Lokos v. Capps*, 625 F.2d 1258 (5th Cir.1980); *Zapata v. Estelle*, 588 F.2d 1017 (5th Cir.1979). Those cases are not applicable to the present case, however, since defendant *did* raise the issue of competence prior to trial and the trial judge agreed there was reasonable ground for a mental examination under La.Code Crim.P. art. 643.

Nomey, 613 So.2d at 162 n. 8. Thus, *Nomey* does not preclude the possibility of a nunc pro tunc competency hearing in a case such as the one *sub judice* where the

trial judge ignored a bona fide doubt as to defendant's competence to stand trial.

The federal courts of appeals, although noting that retrospective competency hearings are not favored, have allowed nunc pro tunc hearings on the issue of competency if a meaningful inquiry into the defendant's competency can still be had. *See, e.g., Reynolds v. Norris*, 86 F.3d 796 (8th Cir.1996); *Watts v. Singletary*, 87 F.3d 1282 (11th Cir.1996); *United States v. Renfroe*, 825 F.2d 763 (3rd Cir.1987); *Zapata v. Estelle*, 588 F.2d 1017 (5th Cir.1979). The trial court is [3] in the best position to determine whether it can make a retrospective determination of defendant's competency during his trial and sentencing. *Renfroe*, 825 F.2d at 767. The determination of whether a trial court can hold a meaningful retrospective competency hearing is necessarily decided on a case-by-case basis. *Miller v. Dugger*, 838 F.2d 1530 (11th Cir.1988). The State bears the burden to show the court that the tools of rational decision are available. *Lokos v. Capps*, 625 F.2d 1258 (5th Cir.1980).[16]

A "meaningful" determination is possible "where the state of the record, together with such additional evidence as may be relevant and available, permits an accurate assessment of the defendant's condition at the time of the original state proceedings." *Reynolds*, 86 F.3d at 802. Additionally, "[w]hen determining whether a meaningful hearing may be held, we look to the existence of contemporaneous medical evidence, the recollections of non-experts who had the opportunity to interact with the defendant during the relevant period, statements by the defendant in the trial transcript, and the existence of medical records. The passage of time is not an insurmountable obstacle if sufficient contemporaneous information is available." *Reynolds*, 86 F.3d at 803 (citations omitted). The court in *Miller v. Dugger*, 838 F.2d 1530 (11th Cir.1988) noted that it had never given the district courts a list of factors that must be met in order to determine that a nunc pro tunc determination of competency is possible, but stated that relevant factors include time, availability of witnesses and the existence of evidence on the state record about the defendant's mental state at the time.

Because we believe a nunc pro tunc competency hearing may be possible to rectify the trial court's error in failing to make further inquiry into defendant's competency prior to trial, we will remand the case to the trial court for the sole purpose of determining whether such a hearing is now possible and, if so, to conduct such an evidentiary hearing. Because of the sparse testimony before the trial court, we envision the taking of additional testimony and evidence, [3] including medical testimony relating to defendant's mental condition during that time prior to trial when he was allegedly unstabilized on his new medication and the records of examining physicians made during that time period, to allow the trial court to determine whether defendant was competent.[17] *See Renfroe*,

16. The State bears this burden because a nunc pro tunc competency hearing is essentially "a harmless error determination in disguise." *James v. Singletary*, 957 F.2d 1562, 1571, n. 14 (11th Cir.1992). The *James* court reached this conclusion because "*Pate*, in essence, established a rebuttable presumption of incompetency upon a showing by a habeas petitioner that the state trial court failed to hold a competency hearing on its own initiative despite information raising a bona fide doubt as to the petitioner's competency. According to *Pate*, the state could rebut this presumption by proving that the petitioner in fact had been competent at the time of trial." *Id.* at 1570 (footnote omitted).

17. We note that defendant was examined by Drs. Richoux, Deland and Salzer during this time period. Additionally, there is some implication in the record that Dr. Hannie examined defendant during this period. Rec. vol. 2, p. 472. There is no indication when defendant was examined by Dr. Davis, although his testimony and records would certainly be relevant if he also examined defendant at the time he was allegedly unstabilized on his medication. The testimony of doctors or mental health experts who conducted mental examinations close to the trial date increase the probability that the nunc pro tunc hearing will not be unduly speculative. *United States v. Makris*, 535 F.2d 899, 904 (5th Cir.1976). One reason we believe remanding this case to

825 F.2d at 767. If the trial court concludes defendant was competent, no new trial is required to be conducted. *United States v. Haywood*, 155 F.3d 674 (3rd Cir. 1998). If the trial court finds a meaningful inquiry cannot be had, or if it determines after the hearing that defendant was not competent at the time of his trial, defendant shall be entitled to a new trial.[18] *See United States v. Mason*, 52 F.3d 1286 (4th Cir.1995); *Zapata v. Estelle*, 588 F.2d 1017 (5th Cir.1979).

In a related assignment of error, defendant argues that the trial court erred in failing to grant a continuance to give defense counsel more time to prepare. According to the defense, counsel for defendant's penalty phase received his appointment to represent defendant on May 3, 1996, with a trial date on a charge of first degree murder set for August 27, 1996.[19] Prior to trial, defendant filed a second motion for continuance alleging that the penalty phase attorney would only have three and one-half months from the date of his appointment (and two months from the date the State announced it would seek the death penalty) in which to prepare defendant's penalty phase defense. The defense alleged that although it had undertaken "an aggressive effort to investigate the case for mitigation and to prepare its presentation" it needed an additional thirty days to adequately prepare. In a separate motion for continuance, the penalty phase attorney [illegible] again requested a continuance based on the fact that he had participated in another first degree murder trial beginning on July 22, 1996, and lasting ten days. As a result of the time spent preparing for and conducting that trial, defendant's counsel alleged he had less than four weeks to investigate and prepare defendant's mitigation case which included conducting interviews in defendant's hometown of Waterproof, Louisiana, three hours away from counsel's office. After the hearings on these motions, the trial court denied both without reasons.

[32] The denial of a motion for continuance on grounds of counsel's lack of preparedness does not warrant reversal unless counsel demonstrates specific prejudice resulting from the denial. *State v. Haarala*, 398 So.2d 1093, 1099 (La.1981). This specific prejudice requirement has been disregarded by this court in cases where the preparation time was so minimal as to call into question the basic fairness of the proceeding. *State v. Jones*, 395 So.2d 751 (La.1981); *State v. Durio*, 371 So.2d 1158 (La.1979). This court has also held that when preparation time is unreasonably short, counsel has been diligent, and there is a general allegation of prejudice, denial of a motion for a continuance is an abuse of discretion which constitutes reversible error. *Durio*, 371 So.2d at 1161; *State v. Winston*, 327 So.2d 380 (La.1976) (conviction for distribution of heroin reversed when defense counsel was given only three days in which to prepare for trial); *State v. Simpson*, 403 So.2d 1214 (La.1981) (trial court constructively denied defendant right to counsel by appointing new attorney on the day of trial who presented no

the trial court for it to consider whether a meaningful inquiry into defendant's competence can still be had is appropriate is because defendant was examined by several mental health professionals close to his trial date.

18. We need not address whether the trial court abused its discretion in denying the continuance based on defendant's alleged inability to communicate with his counsel because if defendant is found competent after a nunc pro tunc hearing, the denial of the continuance did not constitute an abuse of the trial court's discretion and if defendant is found incompetent, or if a meaningful inquiry cannot be had, the denial of the continuance was obviously an abuse of discretion and per se prejudicial.

19. Defendant represents that prior to that time he was represented by Dale Cannizzaro, who withdrew from the case for medical reasons without filing any pretrial motions in the case.

defense, but only cross-examined the State's witnesses).

[33] In the instant case, even if we assume counsel had four weeks to prepare for the penalty phase of defendant's trial, we cannot say that such an extended period of time was so unreasonably short as to call into question the basic fairness of the proceeding. The situation at hand falls outside the ambit of *Simpson* and *Durio* because defense counsel had an adequate amount of time to prepare for trial. Thus, for the trial court's denial of the motion for continuance based on this ground to constitute reversible error, defense counsel must be able to demonstrate specific prejudice resulting from the denial. Counsel here has not made any specific allegations of prejudice resulting from the denial of this particular motion for continuance, nor has he shown how the mitigation defense was in any way impaired by the denial. *See generally State v. Dupre*, 408 So.2d 1229, 1231 (La.1982). The defense presented seven witnesses in the penalty phase, including a social worker who prepared defendant's psychosocial history, a forensic psychiatrist who examined defendant, defendant's sister, his mother, his former employer, his neighbor and a childhood friend. Defendant's penalty phase counsel obviously had adequate time to develop mitigating evidence. We therefore cannot say either that the trial court abused its discretion in denying the motion for continuance on this ground or that the denial of the motion deprived defendant of a fair trial. The denial did not result in any specific material prejudice to defendant. This portion of this assignment of error lacks merit.

[34] Defense counsel also argues defendant's guilt phase attorney had insufficient time to prepare and thus the motion for continuance to allow counsel additional time to prepare should have been granted. Here, counsel who conducted the guilt phase of defendant's trial was appointed by the trial court to represent defendant on September 28, 1995, eleven months prior to trial. Rec. vol. 1, p. 39. Defense counsel, however, represented to the court that she was only notified of her appointment "at the end of April," some four months before defendant's trial. Rec. vol. 2, p. 332. Even so, defense counsel had an adequate amount of time to prepare for defendant's trial. While four months is not an extensive time to prepare for a capital case, it nonetheless appears sufficient. Furthermore, counsel has not made any specific allegations of prejudice resulting from the denial as to this counsel. Because we cannot say the trial court abused its discretion in denying the continuance on this ground and because no prejudice resulting from the denial has been shown, this portion of the assignment of error lacks merit.

[35] In a related argument, defendant argues that both the time constraints appointed counsel acted under and the mental health problems of defendant combined to destroy defendant's Sixth Amendment right to reasonably competent counsel in the guilt phase of trial under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A claim for ineffective assistance of counsel is generally raised in an application for post-conviction relief. *State v. Burkhalter*, 428 So.2d 449, 456 (La.1983). Post-conviction proceedings enable the district judge to conduct a full evidentiary hearing on the matter. *State v. Hamilton*, 92-2639, p. 4 (La.7/1/97), 699 So.2d 29, 31; *State v. Seiss*, 428 So.2d 444, 449 (La.1983). This court has, however, addressed ineffective assistance of counsel claims on direct review where the record discloses the evidence necessary to decide the issue. *State v. Ratcliff*, 416 So.2d 528, 530 (La.1982). In the present case, however, if the trial court finds on remand that defendant was not able to assist his counsel at the time of trial and therefore reverses defendant's conviction and sentence, defendant's argument of ineffective assistance of counsel at the guilt phase becomes moot. If, on the other hand, the trial court finds defendant was competent at the time of trial, the

issue of ineffective assistance of counsel is relegated to post-conviction proceedings as the record does not contain sufficient evidence for this court to fully explore this issue.

Prior to trial, the defense also moved for a continuance based on the fact that one of defendant's mental health experts "has been unable to complete [psychological] testing of the defendant due to the time constraints attendant to the August 27 trial date." In a related motion heard at the same time, defendant again asked for a continuance because this same expert, Dr. Elaine Salzer, would be out of town during the trial. The trial court denied both motions without reasons.

Dr. Salzer's report was proffered by the defense at the penalty phase of defendant's trial. The report indicated that defendant was tested August 22, 1996. The report authored by Dr. Salzer appears to be comprehensive and does not suggest that her findings were incomplete or inadequate due to a lack of time before trial. Consequently, we cannot conclude that the trial court abused its discretion in failing to grant a continuance on this ground or that defendant was prejudiced by the denial.

Defendant also argues the trial court should have granted a continuance because Dr. Salzer was out of town for the duration of the trial and he wanted to call her as a witness during the penalty phase of his trial. Although the State offered to stipulate that Dr. Salzer would testify consistent with her report, the defense refused to so stipulate, claiming it did "not want this report coming in without her testimony." Rec. vol. 6, p. 1374. The trial court denied the motion for the continuance and accepted defense counsel's proffer of the report for purposes of appellate review.

[36] A motion for a continuance based on the absence of a missing witness must state the facts to which the absent witness is expected to testify, showing the materiality of the testimony and the necessity for the presence of the witness at the trial, circumstances showing the availability of the witness at the time to which the trial is deferred, and facts showing due diligence used in an effort to procure attendance of the witness. La.C.Cr.P. art. 709; *State v. Rogers*, 553 So.2d 453 (La.1989); *State v. Jackson*, 450 So.2d 621 (La.1984). Generally, the "due diligence" requirement of Article 709 is not satisfied when defense counsel fails to have the potential witness subpoenaed. *State v. Atkins*, 360 So.2d 1341 (La.1978); *State v. Terry*, 359 So.2d 172 (La.1978); *State v. Bennett*, 341 So.2d 847 (La.1976); *State v. Elias*, 230 La. 498, 89 So.2d 51 (1956). The record contains no evidence that Dr. Salzer was ever subpoenaed or that defendant attempted to obtain her presence in any way. Furthermore, at the hearing on the motion to continue the penalty phase based on Dr. Salzer's absence, the State argued that she had never been subpoenaed and the defense did not contradict this assertion. As such, we cannot say that the trial court abused its discretion in failing to continue the penalty phase based on Dr. Salzer's absence.

Assignment of Error No. 5

[37] Finally, in his last assignment of error, defendant argues the trial court erred in denying his motion for a new trial filed pursuant to La.C.Cr.P. art. 851.[20]

20. La.C.Cr.P. art. 851 states:

The motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case the motion shall be denied, no matter upon what allegations it is grounded.

The court, on motion of the defendant, shall grant a new trial whenever:

(1) The verdict is contrary to the law and the evidence;

(2) The court's ruling on a written motion, or an objection made during the proceedings, shows prejudicial error;

(3) New and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty;

Defendant made the same [17] allegations in his motion for a new trial that he presents in the instant appeal: (1) that the verdict is contrary to the law and evidence;[21] (2) that the court's ruling on both written motions, and objections made during the proceedings, show prejudicial error, including a *Batson* motion made during voir dire but then specifically supplemented to include other court rulings; (3) that the court erred in failing to continue the trial to allow defense counsel time to prepare; (4) that the court erred in failing to continue the trial to give defense counsel sufficient time to develop a defense of insanity, then specifically supplemented to include the defense's inability to communicate with the defendant at trial and (5) that the ends of justice would be served by the granting of a new trial, both as to the guilt phase and penalty phase.[22] However, as discussed above, with the exception of the trial court's denial of defendant's motion for continuance based upon his alleged inability to communicate with his counsel, there is no error in the trial court's denial of his motion for a new trial. *Cf. State v. Strickland*, 94-0025, p. 51 (La.11/1/96), 683 [18] So.2d 218, 239 (harmless errors, however numerous, do not aggregate to reach the level of reversible error); *State v. Taylor*, 93-2201 (La.2/28/96), 669 So.2d 364 (unpub'd appx.); *State v. Tart*, 93-0772 (La.2/9/96), 672 So.2d 116; *State v. Copeland*, 530 So.2d 526, 544 (La.1988) (citing *State v. Graham*, 422 So.2d 123, 137 (La. 1982)); *State v. Sheppard*, 350 So.2d 615, 651 (La.1977); *see also State v. Smith*, 95-1826, p. 20 (La.App. 1 Cir. 9/27/96), 681 So.2d 980, 994; *Foster v. State*, 639 So.2d

(4) The defendant has discovered, since the verdict or judgment of guilty, a prejudicial error or defect in the proceedings that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before the verdict or judgment; or
(5) The court is of the opinion that the ends of justice would be served by the granting of a new trial, although the defendant may not be entitled to a new trial as a matter of strict legal right.

21. Defendant frames one of his claims as an error by the trial court in denying his motion for new trial under La.C.Cr.P. art. 851(1) (trial court shall grant a new trial when the verdict is contrary to the law and the evidence) and also asks the court to examine the evidence under the *Jackson v. Virginia* standard. However, a motion for new trial presents only the issue of the weight of the evidence, *see Tibbs v. Florida*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982) (setting aside a verdict as against the weight of the evidence, as opposed to the insufficiency of the evidence, under the Due Process Clause does not bar retrial) and is examined under the so-called thirteenth juror standard under which the trial judge re-weighs the evidence. *State v. Voorhies*, 590 So.2d 776, 777 (La.App. 3 Cir.1991). The question of sufficiency is properly raised by a motion for post-verdict judgment of acquittal. La.C.Cr.P. art. 821; *State v. Demery*, 28,396, p. 6 (La.App. 2 Cir. 8/21/96), 679 So.2d 518, 522. *But see* Article 851 comment (d) ("[i]t is the duty of the trial judge to pass upon the sufficiency of the evidence" once ground (1) is raised under Article 851).

In the instant case, the constitutional issue of sufficiency is treated in assignment of error number 1 because the denial of a motion for new trial based upon La.C.Cr.P. art. 851(1) is not subject to review on appeal. *State v. Skelton*, 340 So.2d 256, 259 (La.1976) ("[W]e have uniformly held that a bill of exceptions reserved to the refusal of the trial judge to grant a motion for a new trial based on Article 851(1), relative to sufficiency of the evidence presents nothing for our review.") (citations omitted); *State v. Bartley*, 329 So.2d 431, 433 (La.1976) ("It is well established in Louisiana that an assignment of error reserved to the denial of a motion for a new trial alleging that the verdict is contrary to the law and the evidence presents nothing for appellate review.") (citations omitted).

22. It is settled that a judgment on these grounds (invariably denying the motion) is unreviewable by an appellate court, which may review the grant or denial of a new trial only "for error of law." La.C.Cr.P. art. 858. *See State v. Toomer*, 395 So.2d 1320, 1328 (La.1981) (grant or denial of a new trial under Article 851(5) "presents nothing for this Court's appellate review"); *State v. Williams*, 343 So.2d 1026, 1037 (La.1977) (same), *cert. denied*, 434 U.S. 928, 98 S.Ct. 412, 54 L.Ed.2d 287 (1977); *State v. Cortez*, 503 So.2d 76, 78 (La.App. 5 Cir.1987) (same); *State v. Savoie*, 448 So.2d 129, 135 (La.App. 1 Cir.1984) (same), *writ denied*, 449 So.2d 1345 (La. 1984).

1263, 1303 (Miss.1994) (finding no "near errors" and so rejecting cumulative error analysis). *Cf. Mullen v. Blackburn*, 808 F.2d at 1143, 1147 (5th Cir.1987) (court rejects cumulative error claim and finds that "twenty times zero equals zero"). Those assignments of error which arguably merit the grant of a new trial and reversal of defendant's conviction and/or sentence are thoroughly treated above. Accordingly, this assignment of error is without merit.

CAPITAL SENTENCE REVIEW

[38] Under La.C.Cr.P. art. 905.9 and La.S.Ct.R. 28, this court reviews every sentence of death imposed by the courts of this state to determine if it is constitutionally excessive. In making this determination, the court considers whether the jury imposed the sentence under influence of passion, prejudice or other arbitrary factors; whether the evidence supports the jury's findings with respect to a statutory aggravating circumstance; and whether the sentence is disproportionate, considering both the offense and the offender. In the instant case, the district judge has not submitted a Uniform Capital Sentence Report (USCR) but the Department of Corrections has submitted a Capital Sentence Investigation Report (CSIR). In addition, the State and the defendant each filed a Sentence Review Memorandum.

The CSIR indicates that defendant is a black male born on March, 21, 1962. He was thirty-four years old at the time of the offense. He was born in Catahoula Parish. His mother and father had a common-law marriage. Defendant, the youngest of seven brothers and sisters, was five years old when his parents split up in 1967. His mother never remarried and he had no real father. Apparently, defendant's sisters took on most of the child rearing responsibilities. However, according to the CSIR, the defendant became closer to his father later in life. Defendant was a "C" student in school, but got "A's" in math. He completed the 12th grade and joined the Marine Corps. He served four years active duty and two years inactive duty and was honorably discharged. Defendant worked for Conti Fleeting for four years as a welder/fitter. He also worked as a truck driver and did waterproofing. He held a job as a security guard for Capitol Protective in 1985 and 1986. CSIR, p. 5.

Defendant and Mary Snyder were married for eight years. They have three children. Quinan, age 11; Allen, Jr., age 9; and Jordan, age 7. According to the CSIR he claims that his wife is drinking and using drugs and believes that he would be a danger to her if he is released. He claims that people have lied to her, telling her that he will be eligible for parole in ten years. CSIR, p. 5.

The CSIR also indicates that the defendant is in fair health. Since being in jail, defendant has developed prostatitis and is having problems with his legs. CSIR, p. 5. Defendant admits to using cocaine in 1989 and also admits the use of marijuana. He successfully completed a substance abuse program several years ago and has been opposed to drugs ever since. CSIR, p. 6.

The defendant has received psychiatric treatment in jail. First, court appointed doctors conducted a competency exam in August of 1996. They found that defendant could understand the proceedings against him and was able to assist in his own defense. According to the CSIR, defendant informed the examining physician that he felt as though his mother emotionally and physically abused him, and claimed that both of his parents drank a lot. He also told doctors of his wife's history of promiscuity noting that she had a five month old child before their marriage and was pregnant by him at the time they married. He recalled that he would not marry his wife until after the child was born for fear that it was not his. CSIR, p. 6. Defendant also indicated to the doctors that he had never abused drugs or alcohol but that he did drink large amounts of beer after work during 1986 and 1987, and suffered from black outs. Doctors diagnosed defendant with depression and pre-

scribed Sinequan, which defendant took through most of his incarceration. The CSIR notes that defendant's depressive disorder is likely secondary to the stress of incarceration and anxiety regarding his situation. CSIR, p. 6.

The Department of Corrections contacted members of the defendant's family to obtain a more complete record of defendant's social history. They spoke with Murray Smith, a friend of the defendant, who indicated that he had known him all of his life. He stated that defendant, "is a [49] very nice guy ... [and they'd] done a lot of things together in their time." CSIR, p. 6. He also informed the interviewer that defendant does not do drugs anymore, that he had been "clean and straight" for twelve years. He also indicated that he knows defendant's wife well and thinks that defendant's case was poorly handled. CSIR, p. 6. The interviewer also spoke with Winnie Walker, defendant's mother. She stated that since defendant had been in jail, his wife sold all of his clothes and that a man named "Ralph" moved into his house. She claimed that the defendant's children are with her all the time because they do not want to return to their mother. She believes that the children are intelligent and know what is going on. Additionally, she does not believe defendant received a fair trial on March 26, 1999. CSIR, p. 6.

The CSIR shows that defendant had no juvenile record but received five years probation for distribution of cocaine on September 27, 1989. Defendant successfully completed his probation and attended a drug abuse clinic. CSIR, p. 5.

In the instant case, the state presented only one aggravating circumstance, that defendant knowingly created a risk of death or great bodily harm to more than one person. The jury agreed. La.C.Cr.P. art. 905.4. The defense presented seven witnesses during the penalty phase.

Passion, Prejudice, and other Arbitrary Factors

The defendant contends that three elements injected passion, prejudice, arbitrariness, and caprice into the proceedings: (1) his defense attorneys failed to present evidence of his "mental defect" during the guilty phase of the trial, thus making the evidence of his depressed state during the crime seem like a last ditch effort to save his life during the penalty phase of the trial; (2) the trial court improperly admitted highly prejudicial photographs; and (3) the district attorney impermissibly appealed to prejudice during his closing arguments by referring to the O.J. Simpson case. All of these factors were discussed in depth above in the individual assignments of error and are without merit. An independent review of the record does not provide any other indication of passion, prejudice or any other arbitrary factors.

Aggravating Circumstances

At trial, the State argued that one aggravating circumstances existed: the offender knowingly created a risk of death or great bodily harm to more than one person. The jury found the existence of this circumstance.

[50] As previously discussed in defendant's claim of insufficient evidence, the evidence presented by the State was sufficient to sustain the finding of all of the elements of first degree murder. The evidence also demonstrated that the defendant knowingly created a risk of death or great bodily harm to more than one person, the victim, Howard Wilson, and the defendant's estranged wife, Mary Snyder. La.C.Cr.P. art. 905.4(A)(4). Consequently, the defendant's sentence of death is firmly grounded on the finding of this aggravating circumstance.

Proportionality

Although the federal Constitution does not require a proportionality review, *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), comparative proportionality review remains a relevant consideration in determining the issue of excessiveness in Louisiana. *State v. Burrell*, 561 So.2d 692, 710 (La.1990). This court, however, has vacated only one capital sentence on the ground that it was dispropor-

tionate to the offense and the circumstances of the offender, *State v. Sonnier*, 380 So.2d 1, 7 (La.1979), although it effectively decapitalized another death penalty reversal on other grounds. *See State v. Weiland*, 505 So.2d 702 (La.1987) (on remand, the state reduced the charge to second degree murder and the jury returned a verdict of manslaughter).

[39] This court reviews death sentences to determine whether the sentence is disproportionate to the penalty imposed in other cases, considering both the offense and the offender. If the jury's recommendation of death is inconsistent with sentences imposed in similar cases in the same jurisdiction, an inference of arbitrariness arises. *Sonnier, supra.*

The State's Sentence Review Memorandum reveals that since 1976, jurors in the 24th Judicial District, have returned a guilty verdict for a first degree murder charge in 65 cases, including the defendant's case, and recommended imposition of the death penalty 18 times, including the current case. Ten [23] of the 18 cases in which the jury returned a death sentence involved as an aggravating factor the risk of death or great bodily harm to more than one person. The first of the ten cases is that of Benjamin Berry, who fatally shot a law enforcement officer during a bank robbery. Berry was executed in 1987. *State v. Berry*, 391 So.2d 406 (La. 1980); *cert. denied*, 451 U.S. 1010, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981). The second case is that of Tyronne Lindsey, who killed a shopper in the Oakwood Mall parking lot. After numerous resentencings and a retrial, Lindsey was once again sentenced to death. *State v. Lindsey*, 543 So.2d 886 (La.1989); *cert denied*, 494 U.S. 1074, 110 S.Ct. 1796, 108 L.Ed.2d 798 (1990). The third case is that of Jimmy Robinson, who killed the husband of an apartment complex manager in her presence during an armed robbery. This Court affirmed the conviction but vacated the death sentence and, on remand, Robinson received a life sentence. *State v. Robinson*, 421 So.2d 229 (La.1982). The fourth case is that of Leslie Lowenfield who shot and killed his ex-girlfriend, her daughter, parents and current boyfriend. This court affirmed the conviction and sentence. *State v. Lowenfield*, 495 So.2d 1245 (La.1985), cert. denied *Lowenfield v. Louisiana*, 476 U.S. 1153, 106 S.Ct. 2259, 90 L.Ed.2d 704 (1986). The fifth case is that of Glen Keith Weiland, who stabbed his girlfriend and her ex-husband, killing the female victim. This court reversed Weiland's first degree murder conviction. *State v. Weiland*, 505 So.2d 702 (La.1987). On retrial the state amended the indictment to second degree murder. The jury subsequently convicted defendant of manslaughter and he was sentenced to 21 years imprisonment at hard labor. The sixth case is that of Robert Tassin, who shot two victims in the course of an armed robbery/drug deal, one fatally. The court affirmed his conviction and sentence. *State v. Tassin*, 536 So.2d 402 (La.1988). The seventh case is that of Manuel Ortiz, a murder-for-hire case in which the defendant employed a "hitman" to kill his wife and her friend. This Court affirmed defendant's conviction and sentence. *State v. Ortiz*, 96–1609 (La.10/21/97), 701 So.2d 922. The eighth case is that of Julius Lucky, who shot two of his co-workers, one fatally, during the course of an armed robbery. *State v. Lucky*, 96–1687 (appeal pending before this Court). The ninth case is that of Edward Harris, who shot and killed two

23. Two other cases referred to in the State's Capital Sentencing Memorandum have not yet reached this court. Consequently, whether or not the jury found the aggravating factor of risk of death or bodily harm to more than one person is unknown at this time. The cases are as follows:

Elzie Ball shot and killed a delivery man who attempted to stop the armed robbery of a bar owner and employee in progress when he entered the establishment. *State v. Ball*, Docket No. 96–4222, Division "C".

Lawrence Jacobs murdered victim and his mother during the course of an aggravated burglary. *State v. Jacobs*, Docket No. 96–7161, Division "H".

pedestrians in a drive-by shooting. *State v. Harris*, (appeal not yet filed before this court). Last is the case of Damon Thibodeaux who kidnapped, raped and killed Crystal Champagne, a fourteen-year-old girl. *State v. Thibodeaux*, 98–1673 (appeal pending before this court).

[49] The brief outline of the cases above provides strong support for an argument that the death penalty imposed in this case is not disproportionate. In the event that the court decides to resort to use of a statewide basis of comparison, the defendant would be unlikely to fare any better. Cases are legion in which this court has affirmed capital sentences based primarily on the jury's finding that the defendant created the risk of death or great bodily harm to more than one person. *State v. Baldwin*, 96–1660 (La.12/12/97), 705 So.2d 1076 (affirming death penalty based on aggravating factor that defendant created a risk of death or great bodily harm to more than one victim where the defendant shot and killed his estranged wife and the three men with her at the time); *State v. Tart*, 93–0772 (La.2/9/96), 672 So.2d 116 (affirming death penalty where jury found aggravating circumstance that defendant knowingly creating risk of death or great bodily harm to more than one person where defendant murdered his estranged girlfriend and severely wounded her mother); *State v. Sanders*, 93–0001 (La.11/30/94), 648 So.2d 1272 (Defendant killed estranged wife and her new boyfriend, affirmed death penalty based on aggravating factor that defendant created a risk of death or great bodily harm to more than one victim).

DECREE

The conviction and sentence of death are conditionally affirmed on the evidence in the record on appeal. However, a final determination of the appeal is pretermitted, and the case is remanded to the district court for a determination of whether a meaningful inquiry into defendant's competence at the time of trial is now possible and, if so, for an evidentiary hearing and determination on this issue. Defendant's right to appeal from an adverse decision is reserved.

LEMMON, J., concurs in remanding the case to the district court for a reopened hearing on competency to proceed, but otherwise dissents from affirming the conviction and sentence, and assigns reasons.

VICTORY and TRAYLOR, JJ., concur in affirming the defendants conviction and sentence but dissent from the remand.

JOHNSON, J., dissents and assigns reasons.

[1] LEMMON, J., concurring in part and dissenting in part.

The racial bias overtones of the entirety of this rather simple trial require reversal of the conviction and sentence of a black defendant tried by an all-white jury.

Early in the voir dire, the prosecutor accepted a black juror (Brooks). When two other black jurors were peremptorily struck, defense counsel noted their race, but did not attempt to establish a prima facie case of discrimination necessary to make a *Batson* challenge, apparently because one black juror had already been accepted. However, the prosecutor, after peremptorily striking a third black juror, also backstruck Brooks. When required by the judge to give a race-neutral explanation for striking Brooks, the prosecutor stated what essentially was no reason at all, asserting that the juror would miss class as a student teacher and may try to hurry the trial. However, on the previous day when Brooks was accepted, the dean of the school told the judge's clerk that Brooks' missing class would not be a problem, and the prosecutor apparently did not think it would be a problem, since he initially accepted Brooks. The backstriking of Brooks, along with the peremptory challenging of all four of the other blacks on the jury venire, resulted in an all-white jury, and the timing of the Brooks backstrike made the early acceptance of Brooks suspect.

[2] Whether the conviction and sentence should be reversed on the *Batson* issue is a very serious issue. However, the prosecutor's intention to utilize racial bias became crystal clear when he commented during closing argument in the penalty phase that O.J. Simpson "got away with it" in the California verdict that had been rendered shortly before this trial.

Prior to trial, the defense moved to exclude any reference to the Simpson verdict, arguing that this prosecutor "has been all over two parishes talking about 'this is his O.J. Simpson case' " and that any reference to the Simpson verdict, overwhelmingly unpopular in national polls of white citizens, would be extremely prejudicial. The prosecutor did not attempt to explain the relevance of any reference to the Simpson verdict, but gave "my word" that "I will not, at any time during the course of the taking of evidence or before the jury in this case, mention the O.J. Simpson case." The judge stated that, "[b]ased on [the prosecutor's] representations, I'm going to deny your motion."

The prosecutor did not mention the Simpson verdict until closing argument in the penalty phase when he, in effect, urged the all-white jury not to let this O.J. prototype "[get] away with it." The acquittal of Simpson, a high profile black defendant who had threatened to kill himself before his arrest, was totally irrelevant to any issue in the penalty phase of the present case.[1] The prosecutor's attempt to inflame the jury by characterizing Simpson's acquittal as "he got away with it" was highly prejudicial to this black defendant.

[3] I find compelling the rhetorical question by defense counsel in oral argument before this court, asking whether the prosecutor would have ranted about O.J.'s getting away with it if he had not backstruck the only black juror toward the end of voir dire.[2] Racially inflammatory tactics, such as those in the present case, should not be tolerated, even at the expense of the reversal of convictions and sentences obtained by their use. This is the only means this court has to halt similar tactics in the future, perhaps in the guilt phase of the trial of an innocent person.

The senseless carnage by this defendant does not make this a very sympathetic case for the defense. Nevertheless, this defendant is constitutionally entitled to a fair trial that is as free as possible of any aura of racial bias. He did not receive such a trial in this case.

[4] VICTORY, J., concurring in part and dissenting in part.

I agree with all other aspects of the majority opinion, but I dissent from that part of the opinion which finds the trial court erred in failing to investigate defendant's request for a continuance based upon a claim of incompetence and remands the case for a hearing to determine whether a retrospective determination of defendant's competence is possible. I would unconditionally affirm defendant's conviction and sentence.

I note the following from the record:

(1) Defense counsel's motion for a sanity commission in late July, 1996, about a month before trial, contains substantially the same complaints of mental incapacity to proceed as the motion for continuance filed in mid-August, 1996.

(2) A full sanity hearing was held on August 8, 1996. According to Drs. DePrato and McDermott's report:

> [Sinequan] had been effective in abating his depression. However, as his trial

1. The penalty phase of a *capital* case focuses primarily on "the circumstances of the offense and the character and propensities of the offender." The Simpson trial, of course, was not a *capital* case. Therefore, the prosecutor's plea in the *penalty phase* of this case not to let another murderer "[get] away with it" not only was irrelevant to any penalty phase issue, but was an inaccurate comparison since the murderer in this case was already facing a life sentence as a result of the already rendered verdict in the guilt phase.

2. Of course, the vote of only one juror would mandate defendant's being sentenced to life imprisonment.

date approaches, Mr. Snyder's anxiety has escalated. As a consequence of his symptoms, he occasionally has difficulty focusing on questions asked of him and becomes mildly circumstantial and tangential. He is able to be re-directed and can focus his attention when he is provided structure. The results of this evaluation do not provide evidence of cognitive disturbances. He exhibited symptoms consistent with a depressive disorder which is likely secondary to the stress of incarceration and anxiety regarding his current situation. Such symptoms do not interfere with his ability to understand the proceedings against him or to assist in his defense. It is our opinion that Mr. Snyder may benefit from a change in medications. It appears that Sinquan has been maintenanced at a low dose secondary to side effects and may worsen his prostatitis. It is possible that he may benefit from an antidepressant such as Prozac or Zoloft, which can be increased to a level to better control his depressive symptoms. Consequently, it is our opinion, at the time of the evaluation, Mr. Snyder is able to understand the proceedings against him and is able to assist in his defense.

(3) Defendant's medication was changed to Prozac on August 16, 1996. There is *no evidence* that the change to Prozac made defendant's depression *worse*. In fact, Dr. DePrato testified at the sanity hearing that "... some people begin to respond immediately while the full maximum potential can take about six weeks." By the time of defendant's trial, he had been on Prozac for almost two weeks.

(4) At the hearing on defendant's motion for continuance held on August 20, 1996, defendant again did not call his treating physician, Dr. Richoux, as a witness, but proffered his letter dated August 16, 1996, noting the change in medication three days earlier and stating that "... Snyder continues to display severe depressive symptoms that *may* interfere with his ability to assist his attorney...." Yet, Drs. DePrato and McDermott used Dr. Richoux's records of treatment of defendant at JPCC in their evaluation of defendant in their report to the court on August 2, 1996.

Viewed in a light most favorable to defendant, all the hearsay letter possibly shows is that Dr. Richoux *may* have considered defendant's condition to be worse than Drs. DePrato and McDermott did *before* the change in medication, and that, in his opinion, the depression *may* interfere with his ability to assist his attorney. There is no suggestion that Dr. Richoux has ever evaluated defendant's competency to stand trial under the *Bennett* factors, as did Drs. DePrato and McDermott in their exhaustive report to the trial court dated August 2, 1996. Further, it is obvious that Dr. Richoux changed defendant's medication at the suggestion of Drs. DePrato and McDermott, who felt that defendant *might* benefit from Prozac, although Sinequan prescribed by Dr. Richoux had already been effective in abating his depression.

(5) Defense counsel acknowledged that defendant was not incompetent to proceed.

The majority states that "[i]n contrast to the *Lopez* case, the trial court in this case did not undertake any investigation into the allegations made by defense counsel that defendant was having difficulties communicating with her." Maj. Op. at 853. Of course, this is not accurate. These allegations were made by defense counsel in the motion for a sanity commission and the trial court received extensive evidence on the subject at the August 8, 1996 sanity hearing from the testimony of Dr. DePrato and the report presented by Drs. DePrato and McDermott. These doctors discussed the *Bennett* factors at length in their written report and concluded that although the defendant "*occasionally* has difficulty focusing on questions asked of him and becomes *mildly* circumstantial and tangential ... such *symptoms do not interfere with his ability to understand the proceedings against him or to assist in his defense.*"

Defendant had every opportunity to present evidence of his incompetency at the sanity hearing he provoked, but chose not to present any witnesses. The evidence presented by the State at that hearing very strongly proves defendant had the ability to proceed with trial. Merely because on recommendation of the very doctors who found him competent to proceed, his medication was changed to make him *even more competent* to proceed, does not suggest that his competency was or is in question. The trial court allowed defense counsel to testify as to "anything new" of a non-confidential nature that showed defendant was not able to assist her. Instead, she simply continued to reiterate that defendant wanted six weeks to receive the full benefit of the new medication, a fact presented to the trial judge by Dr. DePrato on August 8, 1996 at the sanity hearing *before* he ruled that defendant had the capacity to proceed.

TRAYLOR, concurs in part and dissents in part for reasons assigned by VICTORY, J.

JOHNSON, J., Dissenting.

I would have more confidence in the fairmindedness of this jury and the jury's pronouncement of the death sentence, had the state not used its peremptory challenges to exclude every African American juror, resulting in an all white jury for this black defendant. In my view, this violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), coupled with the prosecutor's inflammatory and prejudicial comparison of this case to the O.J. Simpson trial, require that we set aside the death sentence and remand the case for resentencing.

The Sixth Amendment to the United States Constitution gives a criminal defendant the right to a trial by a jury of his peers. I still believe that racial discrimination in the jury selection process offends the Equal Protection Clause of the Fourteenth Amendment and a pattern of strikes against African American jurors still gives rise to an inference of discrimination. Once the inference of discrimination is present, the prosecutor then has the burden of articulating a race-neutral explanation for striking the African American jurors. The trial judge serves as the gatekeeper, ensuring that racial prejudice, which impedes the securing of equal justice, does not invade our judicial system. As the gatekeeper, the trial judge must decide whether the prosecutor has articulated a genuine concern, or whether the reason articulated is merely a guise to accomplish his/her discriminatory purpose. Verbalized facially neutral reasons can be a pretext for conscious or unconscious racism.

In the present case, the prosecutor's action in accepting the first African–American juror seems to have been a tactic to keep defense counsel from raising *Batson* challenges to the subsequent exclusions. Nonetheless, defense counsel noted in the record which excluded jurors were African–American. The *Batson* challenges to the remaining three African–American jurors, including the one juror who was accepted and later backstruck, were overruled by the trial court. The trial court accepted the prosecutor's "race-neutral" explanations and the majority found them to be "plausible, supported by the record and race neutral."

The prosecutor's discriminatory intent in excluding all African–Americans from the jury was evidenced by his reference to the O.J. Simpson trial during closing arguments. In *State v. Green*, 94–0887 (La.5/22/95), 655 So.2d 272, 287, we recognized that "for a *Batson* challenge to succeed, it is not enough that a racially discriminatory result be evidenced; rather, that result 'must ultimately be traced to a racially discriminatory purpose.'" Here we have a racially discriminatory result. An all-white jury selected by peremptorily excluding the five African–Americans from the venire, and the prosecutor's racially discriminatory purpose of inflaming the jury by referring to O.J. Simpson getting away with murder in California. Because of the nationwide media focus on O.J. Simpson, the defense made a pre-trial mo-

tion to exclude any references to the O.J. Simpson case. This motion was denied by the trial judge based on the prosecutor's assurance that he would not, at any time during the course of taking evidence or before the jury, mention the O.J. Simpson case.[1] It is blatantly clear that the prosecutor did not intend to keep his word. The prosecutor had no need to make reference to this defendant not getting away with murder during the penalty phase of the trial. At this point, the defendant had already been convicted of the crime, so there was nothing for him to "get away with." The prosecutor utilized the O.J. Simpson verdict to racially inflame the jury's passion to sentence this defendant to death. Such tactics leave no doubt in my mind that the prosecutor had a racially discriminatory purpose for excluding the African-American jurors.

The defense argues that the prosecutor's comments on the O.J. Simpson verdict to this all white jury were devastating and requires that the conviction be reversed. While there is much evidence that the majority of white Americans believe O.J. Simpson was guilty of murdering his wife and that he "got away with it," the prosecutor's improper comments during the penalty phase do not implicate the trial phase. The defendant's own confession, plus the testimony of his ex-wife, Mary Snyder who survived this brutal attack, along with that of Gwen Williams, the witness who came to the aid of Ms. Snyder during the attack, support the defendant's conviction of first degree murder. The prosecutor's improper and clearly inflammatory comments did, however, create a substantial risk that the death penalty would be imposed. In my opinion, the defendant's death sentence should be set aside and this matter remanded for resentencing.

For the aforementioned reasons, I respectfully dissent.

98-0331 (La. 4/23/99)

STATE of Louisiana

v.

Bobby L. HAMPTON.

No. 98-KA-0331.

Supreme Court of Louisiana.

April 23, 1999.

Dissenting Opinion of Judge Johnson, June 15, 1999.

Defendant was convicted in the First Judicial District Court, Caddo Parish, Eu-

1. During the hearing on the pre-trial motion to exclude references to the O.J. Simpson case, the following colloquy occurred:

Prosecutor:

Now, certainly, I can assure the Court that I'm not going to get up in my opening voir dire and say, "we're here for the Jefferson Parish O.J. Simpson court—case." I have no intentions of doing that. I have no—perhaps in argument, I don't know. I don't know. It might be inappropriate, but I think it's premature. And I can assure this Court I will make no reference to the O.J. Simpson case at any time during the course of the taking of any evidence in this case.

Defense Attorney:

That's—Judge, evidence is not what I'm worried about. I'm certain he's not going to ask any witnesses, "don't you think this is a whole lot like the O.J. Simpson case?" I'm concerned about Mr. Williams' famous arguments.

....

Defense Attorney:

And I would ask that the court issue a ruling that Mr. Williams is not to refer to this or to make comparisons in any way with the O.J. Simpson case and that he be held in contempt if he does that.

Prosecutor:

Judge, I ask the court to allow me, as an officer of this Court, to conduct this case in the proper manner, but in the way that I see fit. And, I have given the Court my word that I will not, at any time during the course of the taking of evidence or before the jury in this case, mention the O.J. Simpson case.... So, I have—I give the Court my word that I won't do this. I just ask you not to grant this motion.

....

The Court:

Based on Mr. Williams' representations, I'm going to deny your motion.

80

(9)

No. 06-10119 3-14-07

IN THE

SUPREME COURT OF THE UNITED STATES

ALLEN SNYDER
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE LOUISIANA SUPREME COURT

PETITION FOR WRIT OF *CERTIORARI*

THIS IS A CAPITAL CASE

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